Supreme Court, U.S.
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NO. _____

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1998

IN THE INTEREST OF
JEREMY, JOSEPH, JOSHUA AND KRYSTAL
BALDRIDGE
AND
DAVID AND LOREN ANDREW DEERWESTER
ALLEGED TO BE NEGLECTED MINORS

ON PETITION FOR WRIT OF CERTIORARI
TO THE
APPELLATE COURT OF ILLINOIS,
FOURTH JUDICIAL DISTRICT

PETITION FOR WRIT OF CERTIORARI

Joseph L. Deerwester
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22188

QUESTIONS PRESENTED

-I-

When a state seeks to terminate parental rights of a United States citizen based upon the criminal conviction of a parent: Does the final and irrevocable nature of terminating parental rights require additional Due Process safeguards with a rule that no criminal conviction shall be conclusive as to proof of the facts upon which it is based but rather shall be admitted only as prima facie evidence of the facts that shall not be rebutted even though the rebuttal evidence may contradict the criminal court findings and the doctrine of collateral estoppel should not be applied? The basis for such rule being the final and irrevocable nature of termination of parental rights while a criminal conviction is always subject to judicial or executive reversal long after parental rights have been terminated, additional safeguards would prevent possible erroneous termination of

parental rights is warranted.

-II-

In a proceeding to terminate parental rights based upon a prior proceeding where the children were adjudicated neglected and abused using a preponderance of the evidence standard: Doe the state violate Due Process of law required by the Fourteenth Amendment and this court's decision in Santosky v. Kramer, 455 U.S. 745 (1982) which requires proof of unfitness by clear and convincing evidence when the state court has held the parents are collaterally estopped from challenging the findings in the prior adjudication at the unfitness phase of the termination proceeding?

-III-

If the highest court of a state has determined that proof of criminal convictions are admissible in subsequent civil cases as prima facie evidence of the facts upon which they are based but not conclusive

proof and therefore may be rebutted and with such decision binding upon all inferior state courts: Doe the Fourteenth Amendment's Due Process of Law provision require the state's highest court to permit a presentation of rebuttal evidence by a parent in proceedings to fins parental unfitness. Leading to the termination of parental rights which are federally protected?

LIST OF PARTIES

All parties do not appear in the caption of the case on the cover page. The following are parties to the proceedings.

Petitioner, Joseph L. Deerwester (Respondent below), appears Pro-Se:

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Joliet, Illinois 60434-0515

Respondent, Sherry Lynn Hasty-Deerwester (Respondent mother below):

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Arrowsmith, Illinois 61722

Respondent minors, named in the caption on the cover, (Respondent's below) are represented by the minor's guardian ad litem's below:

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and

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Respondent, the People of the State of Illinois, (Petitioner below) is represented by the following counsel:

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Bloomington, Illinois 61702-2400

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and

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Chicago, Illinois 60601

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NO.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1998

IN THE INTEREST OF
JEREMY, JOSEPH, JOSHUA AND KRYSTAL
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ALLEGED TO BE NEGLECTED MINORS

PETITION FOR WRIT OF CERTIORARI
TO THE
APPELLATE COURT OF ILLINOIS,
FOURTH JUDICIAL DISTRICT

NOW COMES your Petitioner, Joseph L. Deerwester, Pro-Se, and respectfully moves this Honorable Court to issue a Writ of Certiorari to review the judgment of the Appellate Court of Illinois, Fourth Judicial District and in support states:

OPINIONS BELOW

The opinion of the Appellate Court of Illinois, Fourth Judicial District, which last reviewed the merits of the case, appears at Appendix A.001 and is published at 298 Ill. App. 3d 250, 698 N.E. 2d 550 (4th Dist. 1998).

The decision of the Circuit Court appears as Appendix B.019 and is unpublished.

The order of the Supreme Court of Illinois, denying leave to appeal from the decision of the Appellate Court of Illinois, appears as Appendix C.024 and is published at 181 Ill. 2d 571, 706 N.E. 2d 497 (Nov.. Term 1998).

JURISDICTION

On December 2, 1998 the Supreme Court of Illinois denied Petitioner's Petition for Leave to Appeal from the decision of the Appellate Court of Illinois, Fourth Judicial District.

On March 2, 1999 Justice John Paul Stevens pursuant to application A 723 granted an enlargement of time to, and including May 1, 1999, in which to file a Petition for Writ of Certiorari. Jurisdiction of Court is invoked under 28 U.S.C. § 1257 (a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U. S. CONSTITUTIONAL, AMENDMENT IX

The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage other retained by the people.

U.S. CONSTITUTION, AMENDMENT XIV, § I

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State

deprive any person of life, liberty, or property, without due process of law; nor deny any person within its jurisdiction the equal protection of laws.

705 ILCS 405/2-18. Due to it's length,

Statute presented in Appendix F,043

705 ILCS 405/2-29. Due to it's length, Statute presented in Appendix G.051

STATEMENT OF CASE

On January 11, 1991 Petitioner's children and step-children were taken into protective custody by DCFS. (R Vol. I, C 29) On April 24, 1991 the minors were made wards of the Court and placed in DCFS custody. (R. Vol. I, C 185). On September 5, 1991 an after born child was made a ward of the Court. (R Vol. X, C44).

On May 24, 1994 Illinois filed a Petition to Terminate the Parental Rights of Petitioner. (R, Vol. IV, C 644; Vol. X, C 93). Illinois filed an Amended Petition to Terminate Parental Rights. (R. Vol. V., C 823-824; Vol. X, C 225-226).There are no allegations Petitioner has abused his biological children.

The trial court took judicial notice of Petitioner's criminal convictions in case No. 91-CF-22, the Appellate Court opinion in the criminal case and of

the files in the juvenile cases. (R. Vol. XV, R. 199 and Vol. XVI, R. 3, 16-17).

Petitioner sought to rebut Illinois' case by presenting evidence to rebut the factual basis of the criminal conviction. This evidence included, but was not limited to expert testimony by Dr. Alison Clarke-Stewart. The trial court barred such evidence on the grounds that it was an attempt to relitigate or attack the testimony and evidence, presented in the criminal trial and prior juvenile adjudication. (R. Vol. XVI, R. 28).

Following arguments (R. Vol. XVIII) the trial court dismissed the Petition stating, in part:

> "There remains three allegations relating to Mr. Deerwester's actions towards step-children, and the Court believes that under the law in the

State of Illinois there is distinction between acts committed upon children which the State seeks to terminate and find--have a finding of unfitness to parent and children upon whom those acts were not committed. The Court finds that the State failed to meet its burden in proving by clear and convincing evidence that as to Mr. Deerwester's two children, Loren and David, . . . that he is depraved as to his parenthood of his biological children, and the court will find that the State has failed to meet its burden as to paragraph six A, B & C. The petition is dismissed." (R. Vol. XVIII, R. 29-31)

Illinois then appealed. (R. Vol. IX, C. 1729; Vol. XIII, C. 786).

On appeal the Appellate Court reversed finding Petitioner's criminal conviction standing alone, was sufficient proof of depravity and proof of his unfitness to parent David and Loren, and remanded. Opinion at 6-11.

Petitioner argued on appeal the court erred in barring evidence to rebut the Illinois' prima facie case of depravity and, if remanded Petitioner should be permited to present whatever evidence he feels may rebut Illinois' prima facie case, even though such may contradict facts in the criminal case. (Appellate Brief at 5-9). The Appellate Court rejected this argument. Opinion at 9-11.

Petitioner then filed for Rehearing arguing two points: 1) the Court's decision was contrary to prior

decisions of the Supreme Court of Illinois holding that proof of criminal convictions is not admissible as conclusive proof of the facts on which it is based in a subsequent civil proceeding and specifically preserved for defendants the opportunity to rebut the factual basis of the conviction, and pointed out that other Appellate Courts have followed the Supreme Court decisions admitting evidence to rebut the prima facie case of the criminal court findings and, 2), the Appellate Court misapplied the doctrine of collateral estoppel. Petition for Rehearing at 2-8. Rehearing was denied on September 3, 1998.

Petitioner filed a Petition for Leave to Appeal. The Petition raised the following questions: 1) whether the decisions below, barring any rebuttal evidence, concerning depravity based on criminal convictions, is contrary to Illinois law; 2) whether the decision

collaterally estopping respondent parent from challenging the neglect and abuse findings in the termination proceeding conflicts with existing case law; and 3) whether the Appellate Court decision holding criminal convictions for conduct against children conclusively establishes depravity to one's biological children, deprives the parent's of fundamental fairness when it does not allow an opportunity to rebut facts underlying the conviction. Petition for Leave to Appeal, (herein after PLTA), at 7-19.

The third question of the PLTA, was couched in the context of the Due Process Clause of the Fourteenth Amendment to the United States Constitution. (PLTA at 16) The Supreme Court of Illinois denied leave to appeal on December 2, 1998. This Petition followed.

REASONS FOR GRANTING WRIT

-I-

In a termination of parental rights proceedings, does due process require an additional safeguard to permit collateral evidence to be used by a respondent parent to rebut a prior criminal conviction, being used by the State to prove parental unfitness?

At the trial court level in this matter, the Petitioner was found unfit to parent his children for the reason of depravity. The basis for this was in part, that Petitioner had been convicted of criminal sexual assault of his step-children, as demonstrated by certified copies of his criminal convictions. (R. Vol. XV, R119)

In determining due process requirements in a given case, the Court must determined what is fundamentally fair, considering relevant precedent

and balance the interests at stake in a particular situation. Lassiter v. Dept. of Social Services, 452 U.S. 18, 27 (1981). Parental rights are fundamental and are far more precious than any property right. Lassiter at 27. In a termination proceeding, the State seeks not merely to infringe upon a fundamental right, but to end it. Thus, the parents interest in accuracy and justice is commanding. Lassiter at 27, Santosky v. Kramer, 455 U.S. 745, 758-759 (1982).

The The United States Congress has recognized that termination of parental rights is a penalty greater than a criminal conviction. H.R. Rep. No. 95-1386, page 22 (1978); U.S. Code Cong. & Admin. News, 1978, pages 7530, 7545.

Termination of parental rights becomes irrevocable as soon as the appeal is final and can never be reversed. Santosky, 455 U.S. at 759. On

the other hand, a criminal conviction is subject to reversal by judicial or executive action, even many years later,for a variety of reasons, including innocence.

Justice Moses Harrison of the Supreme Court of Illinois, in a dissenting opinion in People v. Bull, 185 Ill. 2d 179, 226-227___ N.E. 2d ____ (1998), outlined some Illinois cases where innocent persons have been sentenced to death, only to be exonerated as many as 22 years after convictions. See "High Court from Death Penalty Panel", The Pantagraph, Wednesday, April 7, 1999 (App I.089);USA Today Newspaper, "DNA Testig Free Men" (App. K-164; and U.S. News article " The wrong men on Death Row" (App. L-165). With DNA testing, persons convicted of rape decades ago are being found innocent. A review of cases in Illinois and other jurisdictions show examples, where those

convicted of criminal offenses are later found to be innocent. The Due Process Clause requires that safeguards to protect the rights of parents who have been wrongfully convicted at termination proceedings. This Court has ruled that "[d]ue process is flexible and calls for such procedural protections as the particular situation demands." Gilbert v. Homar, 520 U.S. 924, 117 S. Ct. 1807, 1812 (1997). A termination of parental rights proceeding, based solely upon a criminal conviction, should warrant additional safeguards.

In the instant case, Illinois sought to terminate Petitioner's parental rights based on depravity premised upon his conviction for acts against his step-children. The trial court found Illinois failed to prove parental unfitness and dismissed the Petition. (R. Vol. XVIII, R 29031). The Appellate Court reversed, finding that proof of criminal conduct

based by certified copies of the convictions and the indictment, was, alone, sufficient proof of depravity.

At trial, Petitioner sought to challenge the factual basis of the convictions with testimony of Dr. Alison Clarke-Stewart, Frank M. Picl, and others. The trial court found Petitioner was attempting to impermissibly relitigate or attack the earlier evidence, presented at both the criminal trial and the juvenile adjudication. (R. Vol. XVI, 28; 82-85). Petitioner argued he was not barred from challenging the factual basis of the criminal conviction in a subsequent civil proceeding. Petitioner argued on appeal that Illinois law, held that proof of a criminal conviction is not conclusive, as to the underlying facts, but is only to be admitted as prima facie evidence. Smith v. Andrews, 54 Ill. App. 3d 51 (2nd Dist. 1965) 203 N.E. 2d 160; Thornton v. Paul, 74 Ill. 2d 132, 384 N.E. 2d 335 (1978)

and State Farm Fire & Casualty Co. v. Shelton, 176 Ill. App. 3d 858 (1988)531 N.E. 2d 913 Petitioner further argued that collateral estoppel did not apply. The Appellate Court rejected these arguments.

In his Petition for Rehearing, Petitioner argued the Appellate Court issued an opinion which is contrary to Illinois law. Specifically, Petitioner argued that the Supreme Court of Illinois has held that proof of a criminal conviction is admissible in a subsequent civil proceeding but is not conclusive as to proof of underlying facts. Thornton v. Paul, 74 Ill. 2d 132, 384 N.E. 2d 335, 343 (1979). Petitioner further argued that other Appellate Court decisions have held that a defendant may defend an action by presenting any evidence he believes may rebut the prima facie evidence of his liability (i.e. proof of criminal conviction), even though such

evidence contradicts the criminal court findings.

In addition, the United States District Court for the Northern District of Illinois has concluded that under Illinois law, a criminal conviction is only prima facie evidence of the facts on which it is based. Johnson v. Chicago, 712 F. Supp. 1311 (N.D. Ill. 1989).

In termination proceedings, due process requires that a respondent parent be able to challenge the factual basis of a criminal conviction. As previously noted, termination of parental rights which is protected by the Ninth and Fourteenth Amendments to the Constitution (U.S. Const. Amend. IX and XVI) and from the abridgement under the Privileges and Immunities Clause (U.S. Const. Amend. XIV), is as great, if not a greater penalty than a criminal conviction. Moreover, while termination of parental rights is irreversible, a criminal conviction may

always be reversed. Therefore a substantial difference between the two penalties exist. Protections of parental rights, requires greater safeguards.

While the national trend is to give criminal convictions collateral estoppel effect in subsequent civil proceedings, some jurisdictions still refuse to allow admission of a criminal conviction into evidence in a subsequent civil action or as in Illinois, allow admission of the evidence, but permit relitigation of the facts. (47 Am. Jur. 2d Judgments §732). The varying treatment of this evidence among sister states, allows some parents to challenge facts underlying criminal convictions, while barring others from challenging these facts. In other jurisdictions the uses of criminal judgments are not allowed. Since parental rights are federally

protected by the due process and the privileges and immunities clauses of the Fourteenth Amendment, there should uniform treatment of the effect of criminal convictions in civil proceedings.

Since Illinois has adopted the position that it has, Petitioner was denied his right to due process by the trial court's refusal to allow him to introduce rebuttal evidence challenging the facts underlying the criminal conviction. The proposed rebuttal evidence including the report of Dr. Clarke-Stewart (Appendix J.094), would rebut, and call into question underlying facts of the State's case, relating to parental fitness, thereby rendering it impossible for the State to meet their burden of clear and convincing evidence.

WHEREFORE, Petitioner prays for this Honorable Court to grant certiorari as to this question.

-II-

In a proceeding to terminate parental rights, does due process require that the respondent parent be allowed to collaterally attack evidence originally used to find the minors abused and neglected, where that prior finding was reached by the preponderance of the evidence standard and the burden of proof in the termination proceeding is by clear and convincing evidence?

In Illinois the staandard of proof is the preponderance of the evidence in child abuse and neglect proceedings. (Ill. Rev. State. (1989), Ch. 37, ¶ 802-18(1) (now codified 705 ILCS 405/2-18)) The children were found to be abused and neglected by a preponderance of the evidence in 1992. In 1994, the State sought to terminate Petitioner's parental rights.

Petitioner attempted to offer evidence to challenge the finding of abuse and neglect and its reliability. The trial court refused to allow this challenge on the basis of collateral estoppel. The Appellate Court of Illinois affirmed citing, In re Boolman, 141 Ill. App. 3d 508, 512 (4th Dist. 1986),. . ." [t]his court reasoned [in a proceeding to terminate parental rights] the respondents were collaterally estopped from denying a previous court's determination adjudicating the minor neglected."

In his Petition for Rehearing, Petitioner argued that the trial court's reliance upon Boolman was misplaced.

First, Boolman is factually distinct from the case at bar in that Boolman had the respondent father attempting to rebut the earlier findings of neglect and abuse in the juvenile proceeding. Here,

the issue surrounding the initial juvenile proceeding did not relate to the subject matter of the criminal conviction which the respondent father was seeking to challenge.

Secondly, while the decision in Boolman was decided on the basis of collateral estoppel, there was no discussion as to why collateral estoppel applied and no authority cited for its ruling.

In In re Clarence T.B., 215 Ill. App. 3d 85, 574 N.E. 2d 878, 889 (2nd Dist. 1991), discusses why estoppel principles do not apply in situations like Boolman , and notes Boolman cited no authority for this proposition. Further in Clarence T.B., the court specifically noted that the Boolman case did not consider the differing in burdens of proof in an abuse and neglect proceeding and a termination proceeding.

Since the burden of proof in the former proceeding is lower than the latter, a Court's ruling in the abuse and neglect proceeding should not be binding on a court in a subsequent proceeding. Thus, considering the Second District's reasoned opinion as opposed to this Court's bald assertion in Boolman, Respondent father respectfully asserts this Court misapprehended the estoppel doctrine and should grant a rehearing and explicitly overrule Boolman and/or determine Boolman is not applicable to the case at bar.

In re Clarence T.B. holds that you may challenge a factual issues determined by preponderance of the evidence standard in a subsequent proceeding where the standard of the proof is by clear and convincing evidence.

Therefore, the application of collateral estoppel in this case is wrong and violates Due Process. The decision of the Appellate Court also violates this Court's decision in Santosky v. Kramer, 455 U.S. 745 (1982).

A factual issue determined by preponderance standard does not insure the same facts will meet the clear and convincing evidence standard, especially if controverted with additional evidence required by Santosky. Thus, Petitioner asserts the Appellate Court violates his Due Process rights and Santosky by applying collateral estoppel to prevent a challenge to the former proceedings factual assessment and preclusion of prsentation of additional evidence bearing on the factual assessments previously made.

WHEREFORE, Petitioner prays for this Honorable Court to grant certiorarias to this issue.

-III-

Does the failure of the Illinois State Courts to follow their own precedent, as it relates to the use of a criminal conviction as proof in a subsequent civil case, deprive the respondent parent of his due process rights?

In Illinois, Stare Decisis is a policy of the Courts to stand by precedent and leave settled points of law undisturbed. Decisions that have been established should, in the orderly administration of justice, be deemed controlling unless and until the General Assembly provides otherwise. Charles V. Seigfried, 165 Ill. 2d 482, 651 N.E. 2d 154, 159 (Ill. 1995).

Further, the doctrine does not require courts to follow decisions of equal or inferior courts. Schiffner v. Motorola, Inc., 296 Ill. App. 3d 1099, 697 N.E. 2d 868, 871 (1st Dist. 1998). Thus, a

decision of the Supreme Court of Illinois, or a federal issue determined by this Honorable Court, is binding upon the Appellate and trial courts of this State.

The Supreme Court of Illinois has held proof of a criminal conviction is admissible in a civil case as prima facie evidence of the facts upon which it is based. Thornton v. Paul, 74 Ill. 2d 132, 384 N.E. 2d 335, 343 (1979). The Supreme Court of Illinois stated in Thornton this preferred rule preserves the opportunity to rebut the factual basis of the conviction insofar as those facts are applicable to the civil proceeding. Id.

The opinion of the Appellate Court of Illinois does not follow the decision of the Supreme Court of Illinois, as is required, and the Trial and Appellate Court has refused to permit Petitioner to rebut the

factual basis of the conviction. The Appellate Court of Illinois has, in fact, established a rule for admission of a criminal conviction as conclusive proof of the facts on which it is based. In re J.B., 298 Ill. App. 3d 250, 255-257. (4th Dist. 1998).

In the instant case Parental Rights are protected by the Ninth and Fourteenth Amendments to the Constitution of the United States (U. S. Const. Amend's IX and XIV) from abridgment and from depravation without Due Process of Law.

Due Process requires all inferior State Courts follow the decision of the State's highest Court when State rules and failur to do so herein has resulted in a fundamental unfairness involving Federally protected rights, i.e., a parent child relationship.

Petitioner has not located any case law directly

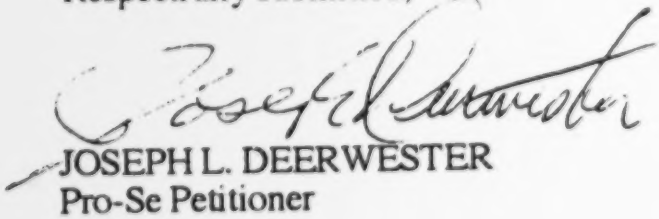
addressing the issue, thus, it appears this may be one of first impression for this Honorable Court. Petitioner believes that fundamental fairness does require inferior State Court's to follow decision of the highest State Courts, especially when failure to do so, as here, deprives a party from presenting a defense.

WHEREFORE, Petitioner prays for this Honorable Court to grant certiorari and address this issue.

CONCLUSION

WHEREFORE, Petitioner prays for this Honorable Court to grant a Writ of Certiorari to the Appellate Court of Illinois, Fourth Judicial District as to each question presented herein.

Respectfully submitted,



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APPENDIX

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NO. 4-97-0916

IN THE APPELLATE COURT

OF ILLINOIS

FOURTH DISTRICT

In the Interest of J.B., J.B., J.B., K.B., D.D. and L.A.D., Alleged to be Abused and Neglected Minors,	) Appeal from) Circuit Court) McLean) County
THE PEOPLE OF THE STATE OF ILLINOIS, Petitioner-Appellant,	) Nos. 91 J 2) 92 J 64
v.	
JOSEPH DEERWESTER, Respondent-Appellee	) Honorable) Elizabeth A.) Robb, Judge) Presiding.

JUSTICE GREEN delivered the opinion of the court:

The State appeals from an order entered by the circuit court of McLean County on September 18,

1997, dismissing its petition to terminate the parental rights of respondent, Joseph Deerwester, to D.D. (born October 5, 1989) and L.D. (born April 16, 1991) in McLean County case Nos. 91-J-2 and 92-J-64, respectively. On appeal, the State contends that evidence of respondent's criminal convictions for offenses against his stepchildren in McLean County case No. 91-CF-22 was sufficient for the trial court to have found that respondent was an unfit parent based on depravity (750 ILCS 50/1 (D) (i) (West 1996)). We agree with the State and reverse and remand to the trial court.

Respondent had four minor stepchildren with whom he lived in a one-room trailer and raised as his own children with their mother, his wife, Sherry Deerwester. Those children are Je. B. (born December 21, 1983), Jo. B (born December 28, 1984), Ja. B. (born March 17, 1986), and K.B. (born May 28, 1988). Respondent and Sherry had

two children of their own, D.D. and L.D., who are the subjects of the termination proceedings against respondent. L.D. never lived with the respondent as she was born after respondent was incarcerated. Sherry is not a respondent to the instant termination proceedings.

On January 22, 1991, the four stepchildren and D.D. were taken into protective custody due to allegations of neglect and abuse. An investigation ensued by the Bloomington police department and, on February 14, 1991, respondent was criminally charged with seven counts of aggravated criminal sexual assault (Ill. Rev. Stat. 1989, ch. 38, par. 12-14 (b) (1)), two counts of aggravated criminal sexual abuse (Ill. Rev. Stat. 1989, ch. 38, par. 12-16 (c) (1)), unlawful restraint (Ill. Rev. Stat. 1989, ch. 38, par. 10-3)), and cruelty to children (Ill. Rev. Stat. 1989, ch. 23, par. 2368), based upon acts respondent committed against his four stepchildren. On April 24, 1991, the four stepchildren and D.D. were

adjudicated wards of the court based upon a finding that the children were neglected and abused, the Department of Children and Family Services (DCFS) was appointed guardian, and a protective order was entered prohibiting respondent from having any contact with the children. On September 5, 1991, L.D. was adjudicated a ward of the court based on a finding that she was a neglected minor.

On March 13, 1992, following a jury trial, respondent was found guilty of each of the 11 counts. The trial court imposed three consecutive terms of 40 years' imprisonment with concurrent sentences of 45, 30, 10, 5, and 5 years' imprisonment. On direct appeal, this court upheld all convictions, except count VIII alleging aggravated criminal sexual assault. This court reversed the conviction and sentence as to that count and upheld the other sentences, with certain reductions, in all other counts. People v. Deerwester, 249 Ill. App. 3 d 1109, 660 N.E. 2d 569 (1993) (unpublished order under Supreme Court Rule 23).

On May 23, 1994, the State filed an amended petition to terminate respondent's parental rights to D.D. and L.D. The petition alleged respondent was an unfit parent as defined by section 1(D) of the Adoption Act (ACT) (750 ILCS 5-/1(D) (West 1996)), as follows:

"A. The minor's father was convicted of inflicting sexual abuse and other acts of physical violence on four half-siblings of [D.D.] and [L.D.] in McLean County case No. 91-CF-22, such acts were of a depraved nature and demonstrate [respondent's] unfitness to have a child. [750 ILCS 50/1(D)(i) (West 1994).]

B. The minor's father was convicted of inflicting sexual abuse and other acts of physical violence on four half-siblings of [D.D.] and [L.D.] in McLean County case No. 91-CF-22, such acts being other [than] neglect of, or misconduct toward the children. [750 ILCS 50/1(D)(h) (West 1994).]

C. The minor's father was convicted of inflicting sexual abuse and other acts of physical violence on four half-siblings of [D.D.] and [L.D.] in McLean County case No. 91-CF-22, such acts constitute extreme or repeated cruelty to the children. [750 ILCS 50/1(D)(e) (West 1994).]

D. The minor's father failed to make reasonable efforts to correct the conditions which were the basis for the removal of the children. [750 ILCS 50/1(D)(m) (West 1994).]

E. The minor's father failed to make reasonable progress toward the return of the [children to] him within 12 months of the adjudication of the child under the Juvenile Court Act [of 1987 (705 ILCS 405/2-3 (West 1994)).[750 ILCS 50/1(D)(m) (West 1994).]."

Subsequently, adjudicatory hearings were held on the petition. The court took judicial notice of the 11-count indictment of which respondent was convicted

in case No. 91-CF-22. The 11-count indictment, excluding Count VIII (which this court held on direct review was not sufficiently proved at trial) charged respondent with placing his penis in Jo. B.'s mouth (count I), placing Jo. B.'s penis in respondent's mouth (count II), and placing respondent's penis in Jo. B.'s anus (count VII). Respondent was further charged with placing his penis in K.B.'s mouth (count III), placing respondent's penis in the hand of Ja. B. (count VI), placing respondent's penis in Ja. B.'s anus (count IX), placing respondent's penis in Ja. B.'s mouth (count X), and placing respondent's penis in the hand of Je. .B. (count XI). The indictment further alleged respondent tied Ja. B. up with a rope (count IV) and committed cruelty to children against Ja. B. by throwing Ja. B. against a board, causing a large cut on Ja. B.'s chin (count V). At the time of the indictment, Je. B. was seven years old, Jo. B. was six years old, Ja. B. was four years

old, and K.B. was two years old.

At the termination hearing, the trial court allowed the State's motion to withdraw its request that the court review the transcripts of the criminal proceedings. Thus, the only evidence of respondent's criminal conduct was in the form of certified copies of his convictions, the indictment, and this court's order on direct appeal. Other evidence was presented by the State relating to respondent's compliance with DCFS caseworkers and his service plan goals.

Section 1(D) of the Act sets forth the statutory grounds for parental unfitness, including "depravity." 750 ILCS 50/1(D)(i) (West 1996). The Supreme Court of Illinois has defined depravity in this context as ""an inherent deficiency of moral sense and rectitude."" In re Abdullah, 85 Ill. 2d 300,305, 423 N.E. 2d 915, 917 (1981), quoting Stalder v. Stone, 412 Ill. 488, 498, 107 N.E. 2d 696, 701 (1952),

quoting 26 C.J.S. 975; Young v. Prather, 120 Ill. App. 2d 395, 397, 256 N.E. 2d 670, 671 (1970). The trial court here found the State failed to prove that respondent was an unfit parent because the "heinous and unspeakable acts" of which he was found guilty of committing against his stepchildren did not establish he was depraved as to his biological children, D.D. and L.D., who are the subjects of the termination petition.

We disagree with the trial court and reject respondent's argument that proof of his criminal convictions in case No. 91-CF-22, standing alone, did not serve as a basis for a finding of depravity relating to D.D. and L.D. solely because his victims were stepchildren rather than biological children. We also reject respondent's argument that the State was required to present evidence, presumably the trial transcript, of the underlying facts of the criminal conduct because somehow respondent's sexual

misconduct with his stepchildren, as compare to his biological children, could conceivably be found to be not depraved if all the underlying facts were known. Respondent does not dispute that evidence of parental unfitness regarding one child may serve as the basis for terminating parental rights to that child's siblings, even if the siblings were not directly abused or had not been born at the time the abuse occurred. In re S.H., 284 Ill. App. 3d 393, 400, 672 N.E. 2d 403, 408-09 (1996). As we will discuss, we hold that proof of the respondent's criminal conduct against his stepchildren, as known to the court by certified copies of his convictions and the indictment, was, alone, sufficient proof of his depravity and "inherent deficiency of moral sense and rectitude" to prove his unfitness to parent D.D. and L.D.

The instant case is similar to this court's recent decision in S.H.. There, the respondent father pleaded guilty in criminal proceedings of placing his

penis in his five-year-old daughter's vagina and mouth on several occasions and was sentenced to an eight-year term of imprisonment. Based solely on the evidence of these convictions, the State sought to terminate respondent's parent rights to the daughter and her two siblings based on depravity. At an adjudicatory hearing, the respondent admitted the allegations of sexual misconduct against the daughter. At the termination hearing, the State merely requested the trail court to take judicial notice of respondent's criminal convictions. The trial court concluded the State presented a prima facie case of parental unfitness based on depravity and noted that it had reviewed the report of proceedings in the criminal case. This court affirmed the trial court's termination order.

In affirming, this court discussed the Abdullah decision, where the Supreme Court considered whether evidence of the respondent's conviction for

murdering his ex-wife, the mother of the child to whom the State sought to terminate the respondent's parental rights, in itself, was sufficient to establish depravity. The Supreme Court held that, there, evidence of the conviction, the fact that the murder victim was the child's mother, and the trial court's imposition of extended-term sentences due to the heinous circumstances sufficiently proved depravity. This court in S.H. refused to interpret Abdullah to hold that in all cases a single criminal conviction, without more, will not support a finding of unfitness due to depravity. This court held that the facts in S.H. were distinguishable from murder cases because no set of circumstances could conceivably establish that the respondent's perverted sexual conduct toward his five-year-old daughter would not amount to depravity. Accordingly, this court held:

> "[A] parent who commits acts like these upon his or her own child[ren] is subject to being

found unfit due to depravity based solely upon that conduct, and that parent thereby forever forfeits any claim to any further contact with that child or his or her siblings." (emphasis in original.) S.H., 284 Ill. App. 3d at 400, 672 N.E. 2d at 408.

We conclude the holding in S.H. is equally applicable to the instant case where the sexually abused stepchildren have been raised as respondent;s own biological children. The fact that respondent here was convicted following a trial and the respondent in S.H. pleaded guilty to the criminal offense does not alter this conclusion. Accordingly, proof of the respondent's criminal convictions, based on the allegations set forth in the indictment, in itself establishes respondent;s depravity and unfitness to parent D.D. and L.D. The trial court abused its discretion in failing to so find.

Respondent also contends the trial court erred in not

allowing respondent's proffered testimony of Professor Kathleen Alison Clarke-Stewart. The record indicates the court allowed respondent's offer of proof of the professor's testimony, but denied admission of the evidence on the ground it was an attempt to relitigate the criminal trial and juvenile adjudications.

On appeal, the State contends this court should not consider this issue because respondent failed to file a cross-appeal. On November 4, 1998, this court denied respondent's motion for leave to file a late pro se notice of cross-appeal of interlocutory orders as being unnecessary. In a motion to strike this portion of the State's argument because the State failed to cite to any supporting authority, respondent refers to Solimini v. Thomas, 293 Ill. App. 3d 430, 434-35, 688 N.E. 2d 356, 359 (1997). There, the second District Appellate Court noted that "[t]rial court findings adverse to an appellee do not require the

appellee's cross-appeal if the trial court judgment was not at least in part against the appellee." Solimini, 293 Ill. App. 3d at 434, 688 N.E. 2d at 359. We agree.

However, we do not believe the trial court abused its discretion in refusing to admit the testimony of Professor Clarke-Stewart. The record indicates Professor Clarke-Stewart developed a written report based on an evaluation of the police interviews with the respondent;'s stepchildren and those children's trial testimony, concluding that all the children's accusations were not credible. Professor Clarke-Stewart also testified generally, without ever meeting respondent, that she believed respondent could change his behavior.

In In re Boolman, 141 Ill. App. 3d 508, 512, 491 N.E. 2d 1, 3 (1986), this court, in a termination

proceedings, rejected the respondent's argument that the trial court should have granted them summary judgment on the termination petition where they filed an affidavit stating the minor children had not been abused and they had cooperated with their counselors. The State failed to file a counter affidavit. This court reasoned the respondents were collaterally estopped from denying a previous court's determination adjudicating the minor neglected.

Here, Professor Clarke-Stewart's testimony regarding her report was an attempt by respondent to deny the criminal conduct he performed against his stepchildren, upon which judgments of convictions have already been entered. This evidence is distinguishable from evidence that the court in Abdullah considered as admissible when the State had made a prima facie case of depravity and the burden shifted to the respondent to "explain away the

damning evidence of the conviction, the relationship of the victim to the child, and the sentence. If there were exonerating circumstances that would rebut the initial showing of depravity, defendant was free to present them." Abdullah, 85 Ill. 2d at 307, 423 N.E. 2d at 918. Professor Clarke-Stewart's testimony on her report, attacking the credibility of the stepchildren, cannot be considered exonerating circumstances. Moreover, as already discussed, this case is very similar to S.H. where this court distinguishes these kind of circumstances from the circumstances of murder, as in Abdullah, on the basis that no set of exonerating circumstances can really exist when a parent is guilty of committing a number of sexual assaults on his children or, as here, stepchildren. The trial court here did not abuse its discretion in refusing to admit the testimony of Professor Clarke-Stewart.

Because of our determination that the trial court abused its discretion in not finding respondent was depraved and an unfit parent based on the evidence before it, we need not discuss the State's alternative arguments that it had sufficiently proved the other allegations of the termination petition.

Accordingly, for the reasons we have discussed, we reverse the trial court's dismissal of the State's termination petition and remand for further proceedings.

Reversed and remanded.

GARMAN, P.J., and STEIGMANN, J., concur.

MR. TONER: The criminal trial, that's correct.

THE COURT: Yes, the court is denying that.

The court would indicate first that unfortunately this matter has been tried over an extraordinarily long period of time which the court regrets and unfortunately has been beyond the control of any of these parties in the court's opinion.

The court would further indicate that the court has reviewed the transcripts of the previous hearings on -- of the testimony of the witnesses in these -- in this petition.

The allegations of the amended petitions as to the two Deerwester children consist of three allegations which relate to conduct of the respondent father towards stepchildren, children who are not his biological children, which resulted in criminal convictions. And the State has alleged that by virtue of those convictions for those acts against those children that those acts by the respondent father constitute or make him a depraved individual and unfit to parent a child. Allegations D and E of the amended petition relate to the respondent father's failure to make reasonable efforts to correct

conditions which were the basis for the removal of the children and failure to make reasonable progress toward the return of the children within 12 months.

The standard of proof in these matters is proof by clear and convincing evidence, a higher standard than that in the petition for adjudication of wardship in an abuse or neglect case. The court would acknowledge, as I'm sure the parties can observe, that the court has struggled with the determination of whether this petition has been proved, and the court would further state that the acts for which the respondent father was convicted were not acts committed upon his own biological children whom the State is seeking to have the court find he is unfit to be a parent of. The court finds that with respect to paragraphs D and E that the State has failed to meet its burden of proving that he has made -- failed to make reasonable efforts or failed to make reasonable progress.

The Department of Children and Family Services is mandated when there has been adjudication of abuse and neglect to afford services to a respondent parent. It is certainly I think

understood based upon the factual situation of this case that Mr. Deerwester, facing a long commitment to the Department of Corrections,would be an unlikely candidate to ever parent his biological children. But nonetheless, the law is very clear in the State of Illinois that some attempt must be made to afford him services.

A review of the transcripts discloses that except for one instance when Mr. Jaspers met with him in the jail, was told that further communication should be through Mr. Deerwester's attorney, no further efforts were made by the department to afford him services.

The court suspects that further efforts might have been futile, however the need to make those offers never was forthcoming and needed to have been made in order for the State to prevail in those two allegations.

There remains three allegations relating to Mr. Deerwester's actions towards stepchildren, and the court believes that under the law in the State of Illinois there

is a distinction between acts committed upon children which the State seeks to terminate and find -- having a finding of

unfitness to parent and children upon whom those acts were not committed.

The court finds that the State has failed to meet its burden in proving by clear and convincing evidence that as to Mr. Deerwester's two children, Loren and David,that the acts for which he was found guilty of for committing heinous and unspeakable acts against his stepchildren constitute and establish a basis to find that he is depraved as to his parenthood of his biological children, and the court will find that the State has failed to meet its burden as to paragraph Six A, B, and C. The Petition is dismissed.

MR. TONER: Thank you.

THE COURT: The court -- there is still an underlying wardship and the State needs to know whether--the court needs to know whether the State intends to ask the court to retain wardship or ask the court to discharge wardship?

MS. GRIFFIN: At this point we'd be asking to retain wardship.

THE COURT: All right. Then there will be a further permanency hearing set May 5, 10:30, 1998.

Mr. Deerwester, do you wish to be present?

THE RESPONDENT FATHER: Yes, ma'am.

THE COURT: All parties have notice.

MR. TONER: Thank you.

(Which were all the proceedings had in the hearing of the above cause on said date.)

ILLINOIS SUPREME COURT
JULEANN HORNYAK, CLERK
SUPREME COURT BUILDING
SPRINGFIELD, ILLINOIS 62701
(217) 782-2035

86312

December 2, 1998

Mr. Joseph L. Deerwester
Reg. No. B-33706
P.O. Box 515
Joliet, IL 60434-0515

No. 86312 -
In the interest of J.B., et al., etc., Minors
(People State of Illinois, respondent, v. Joseph Deerwester, petitioner). Leave to appeal, Appellate Court, Fourth District.

The Supreme Court today DENIED the petition for leave to appeal in the above entitled cause.

The mandate of this Court will issue to the Appellate Court on December 24, 1998.

NO. 4-97-0916
IN THE APPELLATE COURT
OF ILLINOIS
FOURTH DISTRICT

In the Interest of J.B., J.B., J.B., K.B., D.D. and L.A.D., Alleged to be Abused and Neglected Minors,	)	Appeal from Circuit Court McLean County
THE PEOPLE OF THE STATE OF ILLINOIS, Petitioner-Appellant,	)	Nos. 91 J 2 92 J 64
v.	)	
JOSEPH DEERWESTER, Respondent-Appellee	)	Honorable Elizabeth A. Robb, Judge Presiding.

PETITION FOR REHEARING

MAY IT PLEASE THE COURT:

NOW COMES Respondent father - appellee, Joseph L. Deerwester, Pro-Se,and in accordance with Illinois Supreme Court Rule 367 moves the Hon. Court grant a rehearing in this cause and modify the opinion filed June 10, 1998 and in support states:

NO. 4-97-0916
IN THE APPELLATE COURT
OF ILLINOIS
FOURTH DISTRICT

In the Interest of J.B., J.B., J.B., K.B., D.D. and L.A.D., Alleged to be Abused and Neglected Minors,	)	Appeal from Circuit Court McLean County
THE PEOPLE OF THE STATE OF ILLINOIS, Petitioner-Appellant,	)	Nos. 91 J 2 92 J 64
v.	)	
JOSEPH DEERWESTER, Respondent-Appellee	)	Honorable Elizabeth A. Robb, Judge Presiding.

PETITION FOR REHEARING

Joseph L. Deerwester
PRO-SE Respondent/Appellee
No. B 33706
Joliet Correctional Center
P.O. Box 515
1125 Collins Street
Joliet, Illinois 60434-0515
Phone: (815) 727-6141

POINT AND AUTHORITIES

-I-

THIS COURT MISAPPREHENDED OR OVERLOOKED RESPONDENT FATHER'S POSITION AND ISSUED AN OPINION WHICH WHICH IS CONTRARY TO CLEAR DECISIONS OF OUR SUPREME COURT

In re [illegible] (1st Dist. 1996) 2
284 Ill. App. 3d 892, 672 N.E. 2d 403

Wade v. Byles (1st Dist. 1996) 2
285 Ill. App. 3d 345

Cates v. Cates (1993) 3, 6
156 Ill. 2d 76

Thornton v. Paul (1978) 3, 4, 5
74 Ill. 2d 132, 384 N.E. 2d 335

State Farm Fire & Casualty Co.v
Shelton (1st Dist. 1988) 3
176 Ill. App. 3d 858, 531 N.E. 2d 913
Appeal denied
125 Ill. 2d 574

In re Owens (1988) 5, 6
125 Ill. 2d 390

Talarico v. Dunlap (1997) 5, 6
177 Ill. 2d 185, 685 N.E. 2d 325

Charles v. Siegfried (1995) 6
165 Ill. 2d 482

-II-

THIS COURT OVERLOOKED THAT IN RE BOOLMAN, 141 ILL. APP. 3D 508 IS NOT CONTROLLING OVER RESPONDENT FATHER'S ATTEMPT TO REBUT THE FACTUAL BASIS OF THE CRIMINAL CONVICTION AND FURTHER MISAPPREHENDED THE ESTOPPEL DOCTRINE.

In re Boolman (4th Dist. 1986) 7, 8
141 Ill. App. 3d 508

In re Clarence T.B. (2nd Dist. 1991) 7
215 Ill. App. 3d 85

ARGUMENT I

THIS COURT MISAPPREHENDED OR OVERLOOKED RESPONDENT FATHER'S POSITION AND ISSUED AN OPINION WHICH IS CONTRARY TO CLEAR DECISIONS OF OUR SUPREME COURT.

As this Court determined, the evidence presented by the People to establish depravity based upon Respondent father's criminal convictions was in the form of certified copies of the criminal

convictions, the indictment, and this Court's order on direct appeal from the criminal conviction Opinion at 5. In reversing the trial court's dismissal of the Petition to Terminate Parental Rights this Court relied upon the decision in In re. S.H., 284 Ill. App. 3d 392, 400, 672 N.E. 2d 403, 408-09 (4th Dist. 1996) in which this court held that a conviction of the nature involved in the instant case is sufficient to [conclusively] establish depravity Opinion at 8-9. Respondent father has difficulty with this Court's opinion both in S.H. and this case. It appears to be implicit in the opinions in this case and S.H. that this Court is of the impression that proof of a criminal conviction for this criminal conduct conclusively established depravity. This holding is squarely contradictory to Illinois law as determined by our Supreme Court and, thus, rehearing should be granted. This Court either misapprehended or overlooked our Supreme Court's decision holding

proof of criminal conviction is admissible in a subsequent civil proceeding but is not conclusive proof of the facts upon which it is based and therefore may be rebutted.

This Court is bound to follow decisions of our Supreme Court Wade v. Byles, 295 Ill. App. 3d 545, 547 (1st Dist. 1998) and precedental effect must be given to implications contained in decisions of the Court and premis implicit in the holding are as authoritative as the holding itself and binding in absence of a contrary decision of the Court Cates v. Cates, 156 Ill. 2d 76, 80, 619 N.E. 2d 715, 717 (1993). In Thornton v. Paul, 74 Ill. 2d 132, 384 N.E. 2d 335 (1979) our Supreme Court refused to allow admission of criminal convictions as conclusive proof of the facts upon which it is based in a civil proceeding N.E. 2d at 343. Instead our Supreme Court held that a criminal conviction is only to be admitted as prima facie evidence. The Court

further specifically preserved for civil defendants the opportunity to rebut the factual basis of the conviction insofar as those facts are applicable to the civil proceeding id. This Court's first district sister relying upon the authority of Thornton concluded in State Farm Fire & Casualty Co. v. Shelton, 176 Ill. App. 3d 858, 531 N.E. 2d 913, 920 (1st Dist. 1988) Appeal denied 125 Ill. 2d 574, 537 N.E. 2d 818 that Shelton was entitled to defend against the wrongful death action by offering whatever testimony or evidence he believed would rebut the prima facie evidence of his liability even though such evidence contradicts the criminal court's findings. The fact that Thornton and State Farm involved an insurers duty to defend and this case involves proving depravity based upon criminal convictions does not alter Thornton's applicability here. In an insurance situation proof of a criminal conviction is admissible as prima facie evidence that could take an insured's

conduct outside a policy's coverage State Farm at 531 N.E. 2d 916 but the factual basis of which may be rebutted Thornton at 384 N.E. 2d 343; State Farm at 531 N.E. 2d 920. Similarly, proof of a criminal conviction is admissible as prima facie evidence of depravity but which could be rebutted. Here, it is clear this Court either misapprehended or overlooked this point argued by Respondent father (Appellee's brief at 6-7) as this Court clearly stated:

> "here, Professor Clarke-Stewart's testimony regarding her report was an attempt by respondent to deny the criminal conduct...upon which judgments of convictions had already been entered."
>
> Opinion at 10

Dr. Stewart's testimony was intended to rebut the prima facie evidence of the factual basis of the conviction as Respondent father is entitled under the authority of our Supreme Court in Thornton.

Moreover, this attempt to rebut was not to be limited to Dr. Stewart's testimony but was to include others as well including but not limited to, Frank M. Picle, Esq., who would have testified as an expert witness Respondent father received ineffective assistance of trial counsel. See generally, Motion in Limine No. 1 (R. Vol. VII, C 1363-1366) and Motion to Continue (R. Vol. VIII, C 1516-1517). These motions were denied on April 16, 1996. (R. Vol. I, C 20). However, the trial court did not allow an offer of proof on these other witnesses (R. Vol. XVI, 82-85) or they were not called due to the trial court's prior orders. This Court, in the opinion, clearly indicated that no exonerating circumstances can really exist. Opinion at 11. This Court appears to misapprehended respondent father's position. Respondent was not attempting to prove exonerating circumstances (although ineffective assistance of

counsel could be exonerating as an explanation for the conviction). What Respondent father was attempting to do, under the authority of Thornton, was attack the very foundation of the conviction which would have included not only an attack on the credibility of the witnesses but also provide expert evidence, not available during criminal appeals, indicating respondent father received ineffective assistance of trial and appellate counsel in the criminal case. While this Court may not like the fact that under the decisions of our Supreme Court Respondent father is entitled in a civil proceeding to rebut the factual basis of the criminal conviction even though such evidence contradicts the criminal courts findings. The trial court abused its discretion in not allowing this and this Court, with respect, is wrong in determining the Court did not abuse its discretion and that Dr. Stewart's testimony would not rebut the factual basis of the conviction.

Furthermore, Respondent father was not collaterally estopped from attacking the criminal convictions. As argued before Appellee's brief at 7-9 under the principles developed by our Supreme Court, circuit court's must ensure that application of offensive use of collateral estopple is not fundamentally unfair to the defendant even though the threshold requirements for collateral estoppel are otherwise satisfied. In re Owens, 125 Ill. 2d 390, 399 (1988). While it is true that in Talarico v. Dunlap, 177 Ill. 2d 185, 685 N.E. 2d 325, 328-329 (1997) our Supreme Court stated it is generally accepted that a criminal conviction collaterally estops a defendant from contesting in a subsequent civil proceeding, the Talarico Court did not rely upon Illinois law but referred to treatise upon the subject from other jurisdictions. In Illinois, Stare Decisis is a policy of the Courts to stand by precedent and leave

settled points of law undisturbed. Decisions that have been established for a long period of years should, in the orderly administration of justice, be deemed controlling unless, and until, the general assembly provides otherwise. Charles v. Siegfried, 165 Ill. 2d 482, 492, 651 N.E. 2d 154, 159 (1995). The controlling precedent which this Court is bound to follow is: (1) admission of a criminal conviction is prima facie, not conclusive, proof of the underlying facts which may be rebutted Thornton v. Paul, 74 Ill. 2d 132, 384 N.E. 2d 335, 343 (1979); and (2) the court;s must ensure that application of offensive use of collateral estoppel is not fundamentally unfair to a defendant even though the threshold requirements for collateral estoppel are otherwise satisfied. In re Owens, 125 Ill. 2d 390, 399 (1988). Talarico, did not address or consider these precedents and therefore is dicta which is not binding due to contrary decisions of our Supreme Court. Cates v. Cates,

156 Ill. 2d 76, 80, 619 N.E. 2d 715 (1993).

For the above reasons this Court should grant a rehearing and modify the opinion and remand order to allow Respondent father to rebut the prima facie case and factual basis of the conviction with whatever evidence or testimony he believes will do so.

ARGUMENT II

THIS COURT OVERLOOKED THAT IN RE BOOLMAN, 141 ILL. APP. 3D 508 IS NOT CONTROLLING OVER RESPONDENT FATHER'S ATTEMPT TO REBUT THE FACTUAL BASIS OF THE CRIMINAL CONVICTION AND FURTHER MISAPPREHENDED THE ESTOPPEL DOCTRINE.

This Court citing In re Boolman, 141 Ill. App. 3d 508, 512, 491 N.E. 2d 1, 3 (4th Dist. 1986) stated Respondent father was collaterally estopped from denying any previous determination adjudicating a minor neglected. Opinion at 10. First, Boolman does not control as respondent father was attempting to rebut the prima facie case based upon

respondent father's criminal conviction (see argument I, supra). The issues for which Respondent father was convicted were never adjudicated in the juvenile proceeding. Second, even if they were adjudicated in the juvenile case, Boolman is a decision which this Court failed to cite any authority in support nor did the Court discuss the principles of estoppel before reaching its conclusion and is therefore wrong. Indeed, Respondent father has found no other Court which relied upon Boolman for this principle. In fact, the only case to directly consider Boolman for this proposition was the Second District in In re Clarence T.B., 215 Ill. App. 3d 85, 574 N.E. 2d 878, 889 (2nd Dist. 1991). In Clarence T.B., the people relied upon Boolman to support their argument the respondents were estopped to deny in a termination proceeding a prior adjudication the children were abused minors. In rejecting the people's argument the Second District

reasoned:

> "We agree with respondents that estoppel principles do not apply in this situation. Boolman cited no authority for that proposition of law and did not consider the difference in the burdens of proof between the proceedings. The burden of proof in a proceeding to determine whether a minor is abused is the preponderance of the evidence standard (see Ill. Rev. State., 1989, ch. 37, par. 802-18(1))[now codified 705 ILCS 405/2-18] whereas in a proceeding seeking to declare parents unfit, the State must prove the allegations by clear and convincing evidence (see Ill. Rev. Stat., 1989, ch. 37, par. 802-29(3)) [now codified 705 ILCS 405/2-29]. It is axiomatic that, because the burden of proof in the former proceeding is lower than

> in the latter proceeding, a court's ruling on a factual issue when determining whether a child is an abused or neglected minor is not binding in the proceeding to determine the fitness of the parents (see People v. Golden (1983), 117 Ill. App. 3d 150, 155, 72 Ill. Dec. 710, 453 N.E. 2d 15; see also People v. Zeravich (1965), 64 Ill. App. 2d 150, 157, 212 N.E. 2d 282.)"
>
> 574 N.E. 2d at 889
> Emphasis original

Thus, considering the Second District's reasoned opinion as opposed to this Court's bald assertion in Boolman. Respondent father respectfully asserts this Court misapprehended the estoppel doctrine and should grant a rehearing and explicitly overrule Boolman and/or determine Boolman is not applicable to the case at bar.

CONCLUSION

WHEREFORE, Respondent father-Appellee prays for this Honorable Court to affirm the Circuit Court grant a rehearing and modify the opinion of June 10, 1998 and require the trial court on remand to allow Respondent father to present whatever testimony or evidence he believes will rebut the prima facie evidence of the criminal conviction and underlying conduct.

Respectfully submitted,

Joseph L. Deerwester
PRO-SE Respondent father-
Appellee
No. B 33706

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DATE: 09/03/1998

RE: Int. of J.B., J.B., J.B. K.B., D.D. &
L.A.D.; Peo.v.Deerwester
General No.: 4-97-0916
McLean 91J2, 92J64

TO COUNSEL:

The court today denied the petition for rehearing filed in the above entitled cause.

It is noted that the mandate has been stayed in this cause by the filing of an affidavit of intent to file petition for leave to appeal to the Illinois Supreme Court.

DARRYL PRATSCHER, CLERK

Appellate Court Fourth District

TO: Charles G. Reynard,State's Attorney
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705 ILCS 405/2-18. EVIDENCE

Test of section effective January 1, 1998.

§ 2-18. Evidence

(1) At the adjudicatory hearing, the court shall first consider only the question whether the minor is abused, neglected or dependent. The standard of proof and the rules of evidence in the nature of civil proceedings in this State are applicable to proceedings under this Article. If the petition also seeks the appointment of a guardian of the person with power to consent to adoption of the minor under Section 2-29, the court may also consider legally admissible evidence at the adjudicatory hearing that one or more grounds of unfitness exists under subdivision D of Section 1 of the Adoption Act.[1]

(2) In any hearing under this Act, the following shall constitute prima facie evidence of abuse or neglect, as the case may be:

(a) Proof that a minor has a medical

diagnosis of battered child syndrome is prima facie evidence of abuse;

(b) Proof that a minor has a medical diagnosis of failure to thrive syndrome is a prima facie evidence of neglect;

(c) Proof that a minor has a medical diagnosis of fetal alcohol syndrome is prima facie evidence of neglect;

(d) Proof that a minor has a medical diagnosis at birth of withdrawal symptoms from narcotics or barbiturates is prima facie evidence of neglect;

(e) Proof of injuries sustained by a minor or of the condition of a minor of such a nature as would ordinarily not be sustained or exist except by reason of the acts or omissions of the parent, custodian or guardian of such minor shall be prima facie evidence of abuse or neglect, as the case may be;

(f) Proof that a parent, custodian or guardian of a minor repeatedly used a drug, to the extent that it has or would ordinarily have the effect of producing in the user a substantial state of stupor, unconsciousness, intoxication, hallucination, disorientation or incompetence, or a substantial impairment of judgment, or a substantial manifestation of irrationality, shall be prima facie evidence of neglect;

(g) Proof that a parent, custodian, or guardian of a minor repeatedly used a controlled substance, as defined in subsection (f) of Section 102 of the Illinois Controlled Substances Act,[2] in the presence of the minor or a sibling of the minor is prima facie evidence of neglect. "Repeated use", for the purpose of this subsection, means more than one use of a controlled substance as defined in subsection (f) of Section 102 of the Illinois Controlled

Substances Act;

(h) Proof that a newborn infant's blood, urine, or meconium contains any amount of a controlled substance as defined in subsection (f) of Section 102 of the Illinois Controlled Substances Act, or a metabolite of a controlled substance, with the exception of controlled substances or metabolites of those substances, the presence of which is the result of medical treatment administered to the mother or the newborn, is prima facie evidence of neglect.

(3) In any hearing under this Act, proof of the abuse, neglect or dependency of one minor shall be admissible evidence on the issue of the abuse, neglect or dependency of any other minor for whom the respondent is responsible.

(4)(a) Any writing, record, photograph or x-ray of any hospital or public or private agency, whether in the form of an entry in a book or

otherwise, made as a memorandum or record of any condition, act, transaction, occurrence or event relating to a minor in an abuse, neglect or dependency proceeding, shall be admissible in evidence as proof of that condition, act, transaction, occurrence or event, if the court finds that the document was made in the regular course of the business of the hospital or agency and that it was in the regular course of such business to make it, at the time of the act, transaction, occurrence or event, or within a reasonable time thereafter. A certification by the head or responsible employee of the hospital or agency that the writing, record, photograph or x-ray is the full and complete record of the condition, act, transaction, occurrence or event and that it satisfies the conditions of this paragraph shall be prima facie evidence of the facts contained in such certification. A certification by someone other than the head of the hospital or agency shall be accompanied by a photocopy of a delegation

of authority signed by both the head of the hospital or agency and by such other employee. All other circumstances of the making of the memorandum, record, photograph or x-ray, including lack of personal knowledge of the maker, may be proved to affect the right to be accorded such evidence, but shall not affect its admissibility.

(b) Any indicated report filed pursuant to the Abused and Neglected Child Reporting Act[3] shall be admissible in evidence.

(c) Previous statements made by the minor relating to any allegations of abuse or neglect shall be admissible in evidence. However, no such statement, if uncorroborated and not subject to cross-examination, shall be sufficient in itself to support a finding of abuse or neglect.

(d) There shall be a rebuttable presumption that a minor is competent to testify in abuse or neglect proceedings. The court shall determine how much

weight to give to the minor's testimony, and may allow the minor to testify in chambers with only the court, the court reporter and attorneys for the parties present.

(e) The privileged character of communication between any professional person and patient or client, except privileges between attorney and client, shall not apply to proceedings subject to this Article.

(f) Proof of the impairment of emotional health or impairment of mental or emotional condition as a result of the failure of the respondent to exercise a minimum degree of care toward a minor may include competent opinion or expert testimony, and may include proof that such impairment lessened during a period when the minor was in the care, custody or supervision of a person or agency other than the respondent.

(5) In any hearing under this Act alleging

neglect for failure to provide education as required by law under subsection (1) of Section 2-3, proof that a minor under 13 years of age who is subject to compulsory school attendance under The School Code is a chronic truant as defined under The School Code[4] shall be prima facie evidence of neglect by the parent or guardian in any hearing under this Act and proof that a minor is 13 years of age or older who is subject to compulsory school attendance under The School Code is a chronic truant shall raise a rebuttable presumption of neglect by the parent or guardian. This subsection (5) shall not apply in counties with 2,000,000 or more inhabitants.

P.A. 85-601, Art. II, § 2-18, eff. Jan. 1, 1988. Amended by P.A. 85-1209, Art. II, § 2-22, eff. Aug. 30, 1988; P.A. 86-883, § 1, eff. Jan. 1, 1990; P.A. 88-343, § 5, eff. Aug. 13, 1993; P.A. 89-704, § 5, eff. Jan. 1, 1998.

Formerly Ill.Rev.Stat.1991, ch. 37, ¶ 802-18.

[1]750 ILCS 50/1.
[2]720 ILCS 570/102.
[3]325 ILCS 5/1 et. seq.
[4]105 ILCS 5/12-1 et. seq.

For text of section effective until January 1, 1998,

see 705 ILCS 405/2-18, ante..

705 ILCS 405/2-29. Adoption of Guardian with power to consent

Test of section effective January 1, 1998.

§ 2-29. Adoption; appointment of guardian with power to consent. (1) A ward of the court under this Act, with the consent of the court, may be the subject of a petition for adoption under "An Act in relation to the adoption of persons, and to repeal an Act therein named", approved July 17, 1959, as now or hereafter amended,[1] or with like consent his or her parents may, in the manner required by such Act, surrender him or her for adoption to an agency legally authorized or licensed to place children for adoption.

(2) If the petition prays and the court finds that it is in the best interest of the minor that a guardian of the person be appointed and authorized to consent to the adoption of the minor, the court with the consent of the parents, if living, or after finding, based upon clear and convincing evidence, that a non-consenting parent is an unfit person as defined in Section 1 of "an Act in relation to the adoption of persons and to repeal an Act therein named", approved July 17, 1959, as amended,[2] may empower the guardian of the person of the minor, in the order appointing him or her as such guardian, to appear in court where any proceedings for the adoption of the minor may at any time be pending and to consent to the adoption. Such consent is sufficient to authorize the court in the adoption proceedings to enter a proper order or judgment of adoption without further notice to, or consent by, the parents of the minor. An order so

empowering the guardian to consent to adoption terminates parental rights, deprives the parents of the minor of all legal rights as respects the minor and relieves them of all parental responsibility for him or her, and frees the minor from all obligations of maintenance and obediences to his or her natural parents.

If the minor is over 14 years of age, the court may, in its discretion, consider the wishes of the minor in determining whether the best interests of the minor would be promoted by the finding of the unfitness of a non-consenting parent.

(3) Parental consent to the order authorizing the guardian of the person to consent to adoption of the minor shall be given in open court whenever possible and otherwise must be given in writing and signed in the form provided in "An Act in relation to the adoption of persons, and to repeal an Act therein named," approved July 17, 1959, as now or hereafter

amended, but no names of petitioners for adoption need be included. A finding of the unfitness of a nonconsenting parent must be made in compliance with that Act and be based upon clear and convincing evidence. Provisions of that Act relating to minors parents and to mentally ill or mentally deficient parents apply to proceedings under this Section and any findings with respect to such parents shall be based upon clear and convincing evidence.

P.A. 85-601, Art. II, § 2-29, eff. Jan. 1, 1988.

Formerly Ill.Rev.Stat.1991, ch. 37, ¶ 802-29.

[1]750 ILCS 50/1.et. seq.

[2]750 ILCS 50/1.

For text of section effective until January 1, 1998, see

705 ILCS 405/2-29, post.

4-97-0916

IN THE

APPELLATE COURT OF ILLINOIS

FOURTH JUDICIAL DISTRICT

IN the interest of Jeremy, Joseph, Joshua and Krystal Baldridge and David and Loren Andrew Deerwester, alleged to be neglected minors,	Appeal from the Circuit Court of the 11th Judicial Circuit McLean County, Illinois
vs.	No.: 91-J-2 91 J-64
THE PEOPLE OF THE STATE OF ILLINOIS, Petitioner-Appellant,	
vs.	Honorable Elizabeth Robb,
JOSEPH L. DEERWESTER, Respondent-Appellee.	Judge Presiding

APPELLEE'S BRIEF AND ARGUMENT

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ORAL ARGUMENT REQUESTED

I

POINT AND AUTHORITIES

THE TRIAL COURT CORRECTLY FOUND THE STATE FAILED TO MEET IT'S BURDEN OF PROVING RESPONDENT FATHER'S UNFITNESS BY CLEAR AND CONVINCING EVIDENCE. HOWEVER, THE TRIAL COURT DID MAKE ERROR;'S WHICH DEPRIVED RESPONDENT FATHER OF A FUNDAMENTALLY FAIR PROCEEDING

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I

ARGUMENT

THE TRIAL COURT CORRECTLY FOUND THE STATE FAILED TO MEET IT'S BURDEN OF PROVING RESPONDENT FATHER'S UNFITNESS BY CLEAR AND CONVINCING EVIDENCE. HOWEVER, THE TRIAL COURT DID MAKE ERROR'S WHICH DEPRIVED RESPONDENT FATHER OF A FUNDAMENTALLY FAIR PROCEEDING

ONE

The People initially argue the trial court was operating under a misconception of the law when finding the People failed to meet its burden of proof. (Appellant's Brief at 24-28).

STANDARD OF REVIEW

In cases dealing with parental unfitness, the standard of proof is clear and convincing evidence In re A.P., 277 Ill. App. 3d 592, 660 N.E. 2d 1006, 1010 (4th Dist. 1996). It is well settled that a finding of

unfitness will not be disturbed unless it is against the manifest weight o the evidence In re B.C. & W.C., minors, 247 Ill. App. 3d 803, 804-05 (3rd Dist. 1993). A finding of fact or verdict is against the manifest weight of the evidence where, upon review of all the

evidence in the light most favorable to the prevailing party, an opposite conclusion is clearly apparent or the fact finder's finding is palpably erroneous and wholly unwarranted, is clearly the result of passion or prejudice, or appears to be arbitrary and unsubstantiated by the evidence Joel R. v. Board of Education, 292 Ill. App. 3d 607, 613 (1st Dist. 1997); Usselmann v. Jansen, 257 Ill. App. 3d 978, 981. The determination of fitness is a finding of fact. The case at bar presents mixed questions of law and fact. The Supreme Court of the United States has defined mixed questions as those in which the historical facts are admitted or established, the rule of law is undisputed, and the issue is whether the facts

satisfy the [relevant legal] standard, or to put it another way, whether the rule of law as applied to the established facts is or is not violated Joel R. v. Board of Education, 292 Ill. App. 3d at 612 citing Pullman-Standard., Swint, 456 U.S. 273, 289 note 19 (1982).

The review of mixed question of law and fact necessitates three steps be taken by this Court. First step in the process is establishment of basic, primary or historical facts: facts in the sense of a recital or external events and the credibility of their narrators. The second step is selection of the applicable legal rule. The third step (and the most troublesome for purposes of standard review) is application of the law to fact or, in other words, the determination of whether the rule as applied to law are reviewed under nondifferential, de novo standard Joel R. v. Board of Education, 292 Ill. App. 3d at 613 citing Roubik v. Merrill Lynch, et. al., 285 Ill. App. 3d 217, 219 (1996).

The People having failed to cite the proper standard of review for the first issue raised in their brief, specifically, that Respondent Father is depraved where the issue centers on the trial court's determination of the applicable law as required by Supreme Court Rule 341 (Appellant's Brief at 24-29), Respondent Father petitions the Court to strike the affecting argument from Appellants Brief as a sanction.

As Respondent Father will raised the issue concerning evidence barred from presentation in the trial court and the overall issue may be decided in favor of Respondent Father initially without discussing the barred evidence, Respondent Father will present his response to People's Argument A in two stages. For purposes of the first stage, and solely arguendo, Respondent Father will concede that if the trial court misapplied the applicable law, the evidence as presented in the trial court would be

sufficient to establish depravity. The question thus is; did the trial court select the applicable legal rule?

STAGE ONE

It has been established that a single criminal conviction without more, will not support a finding of unfitness based upon depravity, a point which our Supreme Court has never rejected. In re Abdullah, 85 Ill. 2d 300, 4223 N.E. 2d 915 (1981). This Court, however, established an exception to this rule in In re S.H., 284 Ill. App. 3d 392, 672 N.E. 2d 403, 408 (4th Dist. 1996) (a parent who commits acts like these on his own child is subject to being found unfit due to

depravity based solely upon that conduct). Under these decisions the rule of law is clear. The People were required to present the evidence underlying the conviction rather than standing on a certified copy of the conviction except when the criminal conviction is against the Respondent Father's own i.e., biological child. In such case, a certified copy of the conviction

is sufficient. That is the rule of law as established. Having established the facts and the rule of law, we turn to the third step in of the review process applying the law to the facts whether the rule of law as applied to the facts is or is not violated. The facts consisting of certified copies of Respondent Father's criminal convictions for conduct perpetrated upon persons other than David Lee or Loren Andrew Deerwester without a presentation of the underlying facts fail to provide enough evidence to prove depravity under the applicable rule of law.

The People assert, however, that it enters the realm of the ridiculous to require that a Respondent's depraved acts be committed against his or her own children rather than step-children in order to establish depravity, a point to which Respondent agrees. That is not what Abdullah and S.H. stand for. By their plain language (which the trial court correctly applied) they require the People to offer factual proof underlying the conviction except when the depraved

conduct is perpetrated directly against biological children. They do not require depraved acts be committed against a Respondent's own children rather than step-children. The rule simply requires the People to present underlying facts of conduct committed against step-children rather than just a certified copy of a criminal conviction. Such requirement is not entering the realm of the ridiculous either. For example: Actor Woody Allen has engaged in sexual relations and ultimately married, his his adopted step-daughter whom he had raised as his own. Does that fact establish depravity? What about a case where a couple separate and beginning at the time of divorce the step father begins having sexual relations with his 17 year old step-daughter who is now living with her mother. Does this establish per se depravity and indicate the father will engage in sexual relations with his 13 year old daughter? There are many different factual situations which may arise that would warrant against S.H.'s per se depravity

standard where step-children are involved. Thus, it would be reasonable to limit S.H.'s exception, as the trial court did, to biological children.

Since the People failed to introduce evidence other than a certified copy of criminal convictions sufficient to establish depravity in this case, (a situation opposite to the evidence presented in the cases relied upon the People in their brief) the trial court's decision was not against the manifest weight of evidence of contrary to the established rule of law. Therefore this Court should affirm the trial court.

STAGE TWO

In the event this Court agrees with the People and remands this cause to the trial court, Respondent Father asserts the trial court erred in refusing to allow introduction of evidence to rebut the People's case and moves this Court to direct the trial court to permit Respondent Father to introduce rebuttal evidence. Respondent sought to challenge the People's prima facie case and Petitioner and Respondent minors and

mother objected. After arguments the trial court barred Respondent from rebutting the People's initial showing of depravity. (R. Vol. XVI, at 28). Respondent also moved the trial court to reconsider. (R, Vol. IX, C 1709-1718)-Argument (R. Vol. XVII, 13-22), additional argument (R, Vol. XVIII, 4-7). The trial court denied the Motion to Reconsider. (R. Vol. XVIII, 8).

The basis for the trial court's refusal to allow Respondent Father to present witness's was that the Court found Respondent Father's witness's to be an attempt to Re litigate or attack the testimony and evidence presented at both the criminal trail and the juvenile adjudication. (Dr.Stewart, R. Vol. XVI, 28: Michael Fazio, R. Vol. XVI, 82-85).

STANDARD OF REVIEW

Admissibility of evidence at trial is committed to the sound discretion of

the trial court and its determination will not be overturned absent a showing of clear abuse or that

discretion resulting in substantial prejudice affecting the outcome of the trial. Leonardi v. Loyola University of Chicago, 168 Ill. 2d 83, 658 N.E,. 2d 450, (1995), Holston v. Sisters of the Third Order of St. Francis, 165 Ill. 2d 150, 650 N.E. 2d 450, (1995).

Initially, this Court should be made aware of what weight a criminal conviction is to be given. In Smith v. Andrews, 54 Ill. App. 2d 51, 203 N.E. 2d 160 (2nd Dist. 1965) (a proceeding to terminate parental rights based on depravity), the defendant argued that proof of prior criminal convictions were inadmissible to prove that he actually committed the crimes of which he was convicted. The Andrews Court disagreed and held defendant's criminal convictions of rape was admissible as prima facie evidence defendant had in fact committed a rape but refused to go so far as to hold that a judgment of conviction should be conclusive in a later civil proceeding. The Court also held that to insure no inequity will result,

that the opportunity for rebuttal should be left open. Smith, 203 N.E. 2d 335, 342-43 (1978) adopted the holding in Smith and declared proof of a criminal conviction is admissible but as conclusive proof of the factual basis of a conviction but only as prima facie evidence. The Court strictly stated that this approach preserves the opportunity to rebut the factual basis of the conviction insofar as those facts are applicable to the civil, proceeding. id This rule holds true to this day and as the 1st District stated in State Farm Fire & Casualty Co. v. Shelton, 176 Ill. App. 3d 858, 531 N.E. 2d 913, 920 (1st Dist. 1988) "In our opinion, the cases require us to hold that Shelton is entitled to defendant against the wrongful death action by offering whatever testimony or evidence he believes will rebut the prima facie evidence of his liability, even though such evidence contradicts the criminal court's findings-*** while the criminal conviction is certainly strong evidence, the Supreme Court holds that it is not conclusive." Thus

Respondent Father is entitled to present testimony or evidence in subsequent civil proceedings to rebut the prima facie case. The trial court refused to allow Respondent Father an opportunity to rebut the evidence and this has deprived Respondent Father of a fundamentally fair proceeding.

COLLATERAL ESTOPPEL

The trial court further erred in finding Respondent Father was collaterally estopped from rebutting the People's prima facie case. Collateral estoppel is an equitable doctrine. Application of the doctrine precluded a party from relitigating an issue decided in a prior proceeding offensive use of collateral estoppel occurs when a plaintiff seeks to foreclose a defendant from litigating an issue the defendant has previously litigated unsuccessfully in another action. Talarico v. Dunlap, 177 Ill. 2d 185, 685 N.E. 2d 325, 328 (1997). The minimum threshold requirements for the application of collateral estoppel are: (1) the issue decided in the prior adjudication is identical with the

one presented in the suit in question;(2) there was a final judgment on the merits in the prior adjudication; and (3) the party against whom estoppel is asserted was a party or in privity with a party to the prior adjudication. id

For collateral estoppel to apply, a decision on the issue must have been necessary for the judgment in the first litigation, and the person to be bound must have actually litigated the issue in the first suit. Even where the threshold elements of the doctrine are satisfied and an identical common issue is found to exist between a former and current lawsuit, collateral estoppel must not be applied to preclude parties from presenting their claims or defenses unless it is clear that no unfairness results to the party being estopped. id In ordinary civil cases, Circuit Court's must have broad discretion to ensure that application of offensive collateral estoppel is not fundamentally unfair to the defendant, even though the threshold requirements for collateral estoppel are otherwise

satisfied. In re Owens, 125 Ill. 2d 390, 399 (1988). Further, courts must be cautious in allowing the doctrine for collateral estoppel to be used offensively than allowing it to be used defensively. Coronet Insurance Co., v. Travers, 282 Ill.App.3d 920,(1st Dist.1996).

In the case at bar, the trial court allowing offensive use of collateral estoppel to bar Respondent Father from rebutting the People's prima facie case with witness's and whatever evidence he felt would rebut the People's case as permitted by the previously cited rule of Smith, Thornton and Shelton is fundamentally unfair. Moreover, in In re Abdullah, 85 Ill. 2d 300, 4223 N.E. 2d 915 (1981). The People sought to terminate parental rights based on criminal convictions as proof of depravity. Although collateral estoppel may have been applicable, our Supreme Court clearly stated in Abdullah "the evidence presented by the State made out a prima facie case of depravity. The burden of going forward then shifted

to the defendant to explain away the damning evidence of the conviction, the relationship of the victim to the child, and the sentence. If there were exonerating circumstances that would rebut the initial showing of depravity, defendant was free to present them". Abdullah, 423 N.E. 2d at 918. Under these rules and decisions, Respondent Father was entitled to rebut the People's case and the trail court's denial was fundamentally unfair and prejudicial in light of the excluded evidence which included, but was not limited to testimony of Dr. Alison Clarke-Stewart ((R. Vol. XVI, 28-77 and 86-125)(R. Vol. XIX, Respondent Father's exhibit 1 an 2)). Thus, the trial court abused it discretion in barring Respondent Father from rebutting the People's prima facie case. As a final note, Respondent Father was not collaterally estopped to rebut the People's case based on the prior juvenile proceedings. See In re Clarence T.B., 215 Ill. App. 3d 85, 101-103, 574 N.E. 2d 878, 889 (2nd Dist. 1991).

WHEREFORE, Respondent Father prays for this Honorable Court to direct the trial court to permit Respondent Father to present whatever testimony or evidence he feels will rebut the People's prima facie showing of evidence supporting depravity.

II

The People next argue Respondent Father has failed to make any progress, let alone reasonable progress toward the return of David and Loren Deerwester.

STANDARD OF REVIEW

The standard of proof is by clear and convincing evidence In re A.P., 277 Ill. App. 3d 592, 660 N.E. 2d 1006, 1010 (4th Dist. 1996) and the trial court's finding will not be disturbed unless it is against the manifest weight of the evidence. In re B.C. & W.C., minors, 247 Ill. App. 3d 803, 804-05 (3rd Dist. 1993). However, because each case involving parental fitness is Sui Generis, court's generally do not make factual comparisons to other cases. In re

A.S.B., _____Ill.App. 3d __, 688 N.E. 2d 1215, 1221 (2nd Dist. 1997).

ARGUMENT

The People argue that no dispute exist that Respondent Father failed to comply with tasks set forth for him in the client service plans. Caseworker Jaspers contacted Respondent Father's attorney but he never returned the caseworkers call. Couple this with Respondent Father;'s testimony that he was advised not to do anything that may interfere with or jeopardize his criminal proceedings according to the People, supports that Respondent Father has made no progress toward the return of David and Loren (Appellant's Brief at 33-34). The trial court found the People failed to meet their burden of proving that the Respondent Father has failed to make reasonable efforts or reasonable progress. The trial court's finding is not against the manifest weight of evidence. Initially, Respondent Fathers position is the requirement that he make reasonable progress in this

case, applying the Sui Generis principle, would require an admission to criminal acts to which innocence is maintained and would violate his Fifth Amendment Right against self-incrimination (U.S. Const. Amend. V). The Fifth Amendment provides, in part:

> "No person...shall be compelled in any criminal case to be witness against himself." U.S. Const.Amend V

and the Supreme Court of Illinois has stated that the Fifth Amendment against self incrimination applies, not simply in criminal proceedings, but in all settings where persons feel compelled to incriminate themselves. People v. Winsett, 153 Ill. 2d 335, 606 N.E. 2d 1196, 1994. In this case, making reasonable progress and reasonable efforts requires Respondent Father to admit to criminal conduct.(see Client Service Plan Par. 7 (R. Vol XIX, Petitioner's Exhibit 1) as originally filed on April 16, 19911 (R. Vol. I, C

101 and C 116-117). To admit to such allegations would clearly be used against Respondent Father in the event of a retrial in McLean County Case No. 91-CF-22. The trial court agreed Respondent Father still has Fifth Amendment protections.(R. Vol. XV, 86). Thus to compel Respondent Father to make reasonable progress is to punish him for exercising his Fifth Amendment Rights.

Moreover, Respondent Father has previously denied these allegations under oath in testimony in cause 91-J-2. If Respondent Father was to admit to those allegations now, he would be subject to a perjury prosecution and/or contempt of court. Such out of court statements admitting to such allegations would be admissible under various exceptions to the hearsay rule including as declarations against penal interest. It is, thus, clear that in order to make reasonable progress and reasonable efforts, Respondent Father would certainly be compelled to

incriminate himself. Under the Fifth Amendment principles, considering Respondent Father has invoked the protections, to find him unfit on the basis of failing to make reasonable progress or efforts is to punish him for invoking the Fifth Amendment. No exception exist in this case where the children are in the custody and guardianship of their natural mother, where if they were in foster care with no hope of returning home, an exception may very well be warranted.

REASONABLE PROGRESS HAS BEEN MADE

The answer to the question of what reasonable progress is, requires an objective determination and requirement of a parent to make at a minimum, measurable or demonstrateable movement toward the return of a child. In re S.D., 213 Ill. App. 3d 284, 571 N.E. 2d 1162, 1166. In this case the situation that lead to the initial removal has been corrected.

Respondent Father has been incarcerated continuously since January 19, 1991. At present, Respondent Father's outdate is well after the date the children reach 21 years of age. The incarceration makes contact with the children for purposes of providing living quarters and discipline impossible. Therefore, improvement in correcting conditions has been made. As Dr. Stewart reported: "It is my opinion...even if [Respondent Father] were guilty of all the charges he was convicted of, I do not believe this would justify termination of his parental rights. There is no possibility that during supervised visits (in prison) he could exhibit the inappropriate behaviors toward the children of which he has been convicted." (Res. Fathers exhibit 2, p. 17 (R. Vol. XIX)(R. Vol. XVI, 34-77 and 86-125). Thus, the conditions have been reasonably corrected under the circumstances of this case. Furthermore, DCFS caseworker Dawn Weber testified:

> "[T]he whole mission of the department besides protecting the children is to find permanenacy for them. The point in time that I received this case we were doing that with [Respondent Mother]. So in that regard as the caseworker there was no need for me to contact [Respondent Father] as we were returning the children home to a parent." R. Vol. XV, 65

The goal of both reasonable progress and reasonable efforts is toward the goal of returning the children to the home of the parent. In the case at bar, the children can never be returned to the home of Respondent Father as his home is the Illinois Department of Corrections until after the children's 21st birthday. Thus, under the circumstances of this case, the goal of returning home to Respondent Father is meaningless. No progress could ever be made toward such a goal in any circumstance.

Alternatively, the trial court was correct in finding DCFS failed to make some effort offer to Respondent Father a Client Service Plan, but this plan was not discussed with Respondent Father as Mr. Jaspers was directed to go through Respondent's counsel. (R. Vol. XV, 34-35; 38-44). This testimony makes clear Respondent Father would not discuss the issue without Mr. Jaspers going through Respondent Fathers attorney (see R. Vol. XV, 100-101, testimony of Respondent Father). Mr. Jaspers failed to do so. He further showed he had no desire to pursue an offer of services to Respondent Father. Mr. Jaspers testified:

> [Mr. Toner] Q. "Is it the departments policy that a person has to request services of you or are you to go out and offer services to that person?"
>
> [Mr. Jaspers] A. "In some cases we will have to follow a Court Order. One of the things

that I seem to recall is that all contact with the children was terminated by Order of the Judge in this case."

[Mr. Toner] Q. "Okay."

[Mr. Jaspers] A. "It would serve and I speak only from my personal opinion--it would serve no purpose to offer services for reuniting a family when a Judge has ordered us not to."

[Mr. Toner] Q. "Now were getting somewhere, so based upon that, would it be a fair assessment as to that being the reason why no services were offered to Mr. Deerwester?"

[Mr. Jaspers] A. "I would not be able to speak for anyone in the Bloomington office past the time I was in the case, sir."

[Mr. Toner] Q. "At your--at the time that it was on your watch, so to speak, was that

your reason for not offering any services beyond--strike that. Was that your reason for not offering a Client Service Plan after his conviction?"

[Mr. Jaspers] A. "Yes."

R. Vol. XV, 43-44

This testimony makes it clear that Mr. Jaspers did not make much effort to communicate with Respondent Father's counsel. The reason being Mr. Jaspers personally felt, due to the Court's protective Order, it would serve no purpose to offer services to the Respondent Father. The trial court's finding was not against the manifest weight of the evidence considering Mr. Jaspers actions. Moreover, the answer to the question of what reasonable progress and requires a parent to make at a minimum, measurable or demonstrateable movement toward return of a child, In re S.D., 213 Ill. App. 3d 284,

571 N.E. 2d 1162, 1166 (4th Dist. 1991).

However, Caseworker Dawn Weber testified that the children were being returned home to Sherry Deerwester and in her professional estimation there was no point in offering services. (R. Vol. XV, 66). Ms. Weber clarified that the whole point of the Service Plan would be to correct the problem so the children can be returned home, and that it was done in the case of Mrs. Deerwester, so, therefore to include [Respondent Father] in the Service Plan would have been basically moot because the children were already returned home to a parent. (R. Vol. XV, 67-68) Thus, in the opinion of DCFS caseworkers, there was no point in having Respondent Father participate in services. Therefore, DCFS did not make, as the trial court found, attempts to afford services, except for one attempt by Mr. Jaspers when he was directed by Respondent Father that any communication should be through the Respondent Father's attorney, no

offers of services were forth coming. (R. Vol. XVIII 29-31)

Wherefore, the trial court's finding was not against the manifest weight of the evidence and this Honorable Court should affirm the trial court.

THREE

The People next argue that Respondent Father has not made reasonable effort to correct the conditions which led to the removal of the children where he failed to take the first step toward dealing with the abuse by assuming responsibility.

First, the trial courts finding on this issue is not against the manifest weight of the evidence. Respondent Father clearly has acknowledged the need to go through counseling regarding the excessive corporal punishment, but that on advise of counsel, he was not to deal with DCFS until the criminal matters were resolved. (R. Vol. XV, 86-87).

In addition, Respondent Father obtained some counseling while incarcerated. (R. Vol. XV, 88-89).

Then after a transfer to the Illinois Department of Corrections due to the particular circumstances, Respondent Father was in, he could not receive services. (R. Vol. XV, 89) Respondent Father indicated he would have considered services had they been offered. (R. Vol. XXV, 90-91), see cross-examination at (R. Vol. XV, 93; 96; 107-111). The evidence clearly establishes Respondent Father took some steps to acknowledge abuse and had not totally rejected counseling, but would have indeed considered it, had Mr. Jaspers made more effort then he did. (refer to Reasonable Progress Argument, supra). In addition, in the expert opinion of Dr.Alison Clarke-Stewart, Respondent Father should not be required to publicly admit responsibility. (R. Vol. XVI, 95-97). Thus, the trial courts finding the People failed to meet their burden of proof is not against the manifest weight of the evidence. Moreover, the effect required is that it is necessary

toward regaining physical custody. As Respondent Father will be incarcerated until after the children's 21st birthday, he can never regain the physical custody. Under the facts of this case and considering then Sui Generis, reasonable efforts have been made and the trial court's findings were not against the manifest weight of the evidence and should be affirmed.

Alternatively, as greed under reasonable progress, supra, the requirement that Respondent Father make reasonable progress violates his Fifth Amendment Rights and thus, this allegation should be dismissed on that basis.

CONCLUSION

WHEREFORE, Respondent father-Appellee prays for this Honorable Court to affirm the Circuit Court's dismissal of the Petition to Terminate Parental Rights or in the alternative, on remand require the Circuit Court to consider evidence previously excluded even though such evidence tends to contradict the findings of the criminal copurt in McLean County case number 91-CF-22.

Respectfully submitted,

Joseph L. Deerwester
PRO-SE Respondent father-
Appellee

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Wednesday, April 7, 1999 The Pantagraph, Bloomington, Illinois

High Court Forms Death Penalty Panel

By, Kurt Erickson, Springfield bureau chief

SPRINGFIELD--In a move that drew a scathing dissent from one of its own members, the Illinois Supreme Court on Tuesday created a special committee to study the death penalty system.

The panel, comprised of 17 trial court judges from throughout Illinois, is charged with assessing the death penalty process and passing along suggestions to the high court "so that the highest level of justice is attained in these cases," said Illinois Supreme Court Chief Justice Charles Freeman.

Supreme Court Justice James Heiple, however, blasted his colleagues, saying the creation of the panel was nothing more than a public-relations gambit aimed at showing that the high court is

concerned about a system that has come under fire in recent months.

The committee is the third such group to be formed in recent months. The Illinois Attorney General's office and a task force of lawmakers recently announced the creation of separate panels to investigate the state's death penalty system.

"A bandwagon psychology has developed and the Supreme Court doesn't want to be left off the wagon," Heiple said. "In short, the creation of this committee is a public-relations gesture, pure and simple."

The fact-finding rush comes in the wake of two high-profile cases in which condemned inmates have been released from death row. In February, Anthony Porter became the 10th man freed since the state reinstated the death penalty 22 years ago. A second man, Steven Smith-convicted of killing a Pontiac prison official in 1986-was recently released after the

Illinois Supreme Court ruled that prosecutors hadn't found him guilty beyond a reasonable doubt.

Both incidents-as well as the fact that a total of none other death-row prisoners have been set free since 1977-have given death penalty opponents ammunition to call for a moratorium on executions to give officials time to study problems within the capital punishment system.

Heiple, in a sharply worded two-page dissent, said the court's action is unwarranted. He said his colleagues have become too concerned about their image and should stick to reviewing individual cases on their merits.

He noted that a common topic of discussion among fellow justices is "how they can be made to look good in the press." "The question of image is ever-present and from time to time is, as in the case at hand, the motivating reason and justification for court action," Heiple noted."Judges should do the job that

they were hired to do." Heiple wrote. "That is, to decide cases on the basis of the law and the facts and to promulgate procedures that will efficaciously promote the administration of justice. That being done, the matter of public image will resolve itself." said Heiple.

According to Freeman, however, the panel is merely being formed to provide the high court with information that might be used to improve the death penalty process. "Even the best system can be improved upon,: Freeman noted. "But improvements cannot be made without the dissemination of constructive and critical comment."

The panel, which will be chaired by Cook County Circuit Judge Thomas Fitzgerald, consists of eight Cook County judges, five suburban Chicago judges and four other judges from central and southern Illinois. None are Pantagraph-area jurists. The panel is under no deadline to report its findings, other than

that they should make their recommendations "at the earliest opportunity," Freeman said.

REPORT CONCERNING CASE OF JOE DEERWESTER

Prepared by Alison Clarke-Stewart
July 27, 1996

Report based on the following documents:

Reports by the Bloomington Police Department (Det. Fazio)

Reports by Child Protective Services (Mel Devall)

Testimony at 91-J-2 hearing, grand jury hearing, 115-10 hearing, and jury trial (by Joe Deerwester, Sherry Deerwester, Jeremy, Joseph, and Joshua Deerwester, foster parents (Steadman, Barr, Brady, Hopper), Susan Bellas (counselor), Det. Fazio, Mel Devall, relatives (Dorothy Mock, Winnie Harris, Randy Deerwester), physicians (Neal, Sobolewski).

The purpose of my review if these documents was to search for evidence demonstrating questionable investigatory methods that might have lead to errors or exaggerations in the charges of physical and

sexual abuse of which Mr. Deerwester was convicted.

The charges of physical abuse were that Mr. Deerwester:

Beat his stepsons Joshua and Jeremy (leading to observed injuries).

Hit Joshua's penis with a board.

Blocked his stepchildren in their room at night.

Threw Joshua across the room so that he hit and cut his chin on the floor.

Tied the children's hand and feet together for punishment.

Hung Joshua upside down by his feet (and beat him) for punishment.

Forced the children to bite and beat each other for punishment.

The charges of sexual abuse were that Mr. Deerwester:

Pulled on the children's penises

Forced stepsons Jeremy and Joseph to hit, pull, bite, and suck Josh's penis

Masturbated in front of the children

Forced the children to watch him and his wife have sex, including oral sex

Had the children touch his penis (with their hands)

Sucked the children's penises/private parts

Put his penis in children's mouths/ made them suck it/masturbated on them

Penetrated the children anally with his penis

The issue of how to investigate child abuse cases, and more specifically how to interrogate child witnesses, is one that has received considerable attention from legal and mental health professionals and from research psychologists in the past decade or so. A new book by Stephen Ceci and Maggie Bruck, Jeopardy in the Courtroom: A scientific Analysis of Children's Testimony (American Psychological

Association, 1995) gives a comprehensive review of research on this issue. I myself have conducted several studies, including one described in the book, investigating children's suggestibility and the effects of biased and suggestive interviews on children's ability to accurately report events and experiences. Extrapolating to "What the expert witness on children's suggestibility should tell the court" (p. 271), Ceci and Bruck conclude that the following are well-supported and reliable findings:

1. Preschool-aged children are more vulnerable than older children (or adults) to a variety of factors that contribute to unreliable reports.

2. Although young children are often accurate reporters, some do make mistakes, particularly when they undergo suggestive interviews, and these errors are not limited to peripheral details, but may include salient events that involve children's own bodies.

3. Children are most susceptible to

suggestibility when they are interviewed more than once, in interviews containing specific, leading, or suggestive questions, by interviewers who are judgmental or biased, who create "demand characteristics" in the interview (e.g., by subtly rewarding certain responses), who inculcate a negative stereotype about the defendant, who repeat close-ended yes/no questions either within or across interviews, and who pursue only a one-sided hypothesis (e.g., that the alleged perpetrator is guilty, or that abuse occurred). If suggestive techniques are used by a neutral unbiased interviewer in a single interview, this is unlikely to result in a false report. Suggestive questioning is most damaging when the interviewer has a strong confirmatory bias. If the interviewer avoids confirmatory biases by posing and testing alternative hypotheses, suggestive techniques do not seem to result in serious problems. It should also be noted

that suggestive techniques are effective in eliciting reports of actual, real events, too.

Other points raised in the book include the following:

Suggestibility is greater when interviews occur long after the alleged events.

Suggestibility is greater when the interviewer has high status (e.g., a police officer), when he/she exerts his/her authority over the child, and when children feel threatened (because the interviewer has not established rapport and creates an atmosphere of accusation).

Children may be induced to make a false disclosure through the use of peer pressure (i.e., if the interviewer says, other children have already told).

It is impossible to tell whether children's testimony in court is accurate or not based solely on their behavior in the courtroom; even trained adults cannot detect false reports (unless children are deliberately lying). It is not proof that children are

giving false reports if they mechanically parrot the interviewer's words, use adult-like language, exhibit inappropriate affect, or include few perceptual details in their accounts. Children's whose testimony has been "tainted" by suggestive interviewing may be convinced that the false events actually did occur and so their behavior does indicate deliberate deception. There is no specific behavioral syndrome that characterizes victims of sexual abuse (the presence of sexualized behavior does not conclusively demonstrate that sexual abuse occurred).

With these research findings in mind, I examined the records for evidence relating to:

1. The age of children
2. The number of interviews
3. the length of time between alleged abusive event/s and the interviews
4. The status of the interviewers
5. Whether the interview contained leading

suggestive questions, repeated close-ended yes/no questions, evidence that the interviewer was judgmental or biased, created "demand characteristics," fostered a negative stereotype about the defendant, exhibited a "confirmatory bias" (pursuing only a single hypothesis), attempted to exert authority over the child, created an atmosphere of accusation, used "peer pressure."

I also looked for consistency (or inconsistency) between reports of different people and at different times.

Findings

Age of children

At the time the abuse was reported, the four children interviewed ranged in age from 2-7 years. All these children are young enough that suggestibility would be a major concern, particularly for the three youngest children (ages 2, 4, and 6). Krystal was

only two years old and as her interviewers noted it was very difficult for her to verbalize at all. The oldest child suffered from a learning disability that would have made it difficult for him to express himself verbally.

Number of interviews

Jeremy (age 7), Joseph (age 6), and Joshua (age 4) were interviewed a number of times; by a teacher (Jeremy), school social worker (Jeremy), a nurse and doctor at the ER (Joshua), and a CPS worker (all of the children) on 1/9/91; twice by a police detective (all of the children except Krystal) on 1/17/91 and 1/31/91. Foster parents also talked to the children about the alleged sexual abuse (see Devall notes and foster parent's notes). Although foster parent Kathy Barr says in her testimony she just asked Joseph if he wanted to talk about what had happened, she never questioned him about it, at least initially, I infer, she was asking direct questions. For example, in a

phone call on 1/18/91 she reports "Joseph is denying any sexual abuse at this time," which indicates that she has been questioning the child. Then on 1/23/91 she talked to Gloria Cowdry (social worker?) who instructed her not to pump Joe but just let him know they are there to listen. Later the boys also talked weekly to a therapist, who also questioned them about what had occurred. In her testimony at trial, Susan Bellas says, I was trying to have the boys disclose what happened to them as far as any of the abuses and was asking them specific questions about what happened. Thus, although the number of interviews was not excessive or unusual, it should be noted that the children did experience repeated interviews, and most weight should perhaps be given to the earliest one.

Length of time between event/s and interviews

The time between the incident/s of physical abuse that precipitated the report to CPS and the first

interviews was less than a day. For the other alleged incidents of physical and sexual abuse, the time was unclear. These events occurred sometime after Mr. Deerwester began living with the stepchildren in 5/89, so they were within a year and a half. Given the young age of the children, all but the most recent event would have been subject to forgetting. This would have led to some vulnerability to suggestion.

Status of the interviewers

The primary interviews of the children were conducted by a police detective (Michael Fazio) at the police station. There is no indication as to whether he was in uniform at the time of the interviews. There were two other adults present at the interview: Mr. Devall (social worker) and Dawn Wright (CPS intern). The interviews took place at the police station in a small room used for interviews, not a room designed specifically to be "child-friendly". The children were not accompanied by a familiar

adult and, by his own testimony, De. Fazio did not spend any time establishing rapport with the children before asking them questions about abuse. It seems quite likely that the police interviewer would have come across as an authority figure to the children, and also Mr. Devall may have been seen as an authority figure, as he was the one responsible for removing the children from their home. The status of the interviewers, thus, would have contributed to greater suggestibility.

Bias of interviewers (toward sexual abuse)

We know from devall's note that he was already biased toward sexual abuse because on 1/10/91 Detective Mike Essig told him that he has some information that sexual abuse might be going on. Note that in Devall's first interviews with Jeremy and with the three boys together on 1/9/91 there was no mention about sexual abuse, just physical abuse (Josh's penis was hit). Following Devall's

interviews and conversation with Essig, he gave his notes to Fazio, so whatever bias Devall had was carried over to Fazio, and Fazio's interviews, questions about sexual abuse were asked.

Bias of foster parents (toward sexual abuse)

We also see that the foster parents were biased toward believing that the children has been sexually abused. Debbie Brady (phone call 1/16/91 and notes for 115-10 in 1/92) says that Jeremy doesn't say anything about sexual abuse that happened to him, which clearly implies that she believes that something did happen to him. Kathy Barr (phone call 1/18/91) says "Joseph is denying any sexual abuse at this time," which clearly implies she thinks he has been abused. She also says in her handwritten notes that on 1/23/91 she talked to Gloria Cowdry about the "horrible sexual and physical abuse to Joseph, how he still defends mom and says Joe didn't mean to do it."

Bias of counselor Susan Bellas

Susan Bellas started therapy with the boys "because Jeremy's foster mother wanted him to have counseling to help him talk about sexual abuse." Thus she held the assumption from the beginning that the children were abused. She did not see her role as investigator; her role was to provide therapy for abused children. Bellas reads books, talked,and listened to songs about sexual abuse with the children (in fact she gave Joseph the comic book on sexual abuse). In her testimony at trial, she hays I was trying to have the boys disclose that happened to them as afar as any of the abuses and was asking them specific questions about what happened. Josh indicated some sexual abuse, fondling, oral intercourse. I asked him about anal intercourse and he denied that. Did you question any further on it at the time? Not at that time. When Josh denied it,

did that say in your mind that it didn't happen? Not at all.

Content and style of interviews

The only way to determine the content of the interviews would be to examine verbatim transcripts or audiotapes of the actual interviews. This is not possible in this case. All we have available is the handwritten notes from Mr. Devall and the police reports filed by Detective Fazio. I have scrutinized the reports from Mr. Devall and detective Fazio for any suggestion that the interviews contained any of the problems mentioned above. And I have examined Devall and Fazio's testimony in court for clues as to the style in which the interviews were conducted. According to Devall and Fazio's testimony, they knew what questions they asked and just wrote down the children's answers. This is unfortunate because the questions)and their immediate responses) are critical. The following are

my inferences about problems in the interviews.

The interviewers' biases were exhibited in their interviews and in their reporting of the interviews

An example illustrating how Fazio's bias may have influenced his questions and his reporting of the children's responses is the following: "I asked Joseph if Big Joe potties in their mouths. Joseph would just hang his head and not answer." The wording of this response indicated that the interviewer, pursuing a hypothesis of sexual abuse, expected Joseph to confirm this allegation. Later, to the Grand Jury, Fazio erroneously went from the response to a claim that Joseph said Big Joe pottied in all their mouths. So here is evidence that the interviewer's bias influenced his recollection of the child's response. This could have occurred other times to, because his report of the interview was written after the interview without the benefit of tape recording. Another example of misrepresentation

in line with bias by interviewers in their reports to the court: At the 115-10 testimony, Devall says Josh said Joe tried to pull his tallywacker off, but this statement does not appear in Devall's original notes.

The interviewers used "peer pressure" to elicit responses from the children

The way in which peer pressure was used was perhaps unintentional: Devall's interview on 1/9/91 at the children's home (the first interview of Joseph and Joshua) was done with the children all together. The children should have been interviewed individually to prevent contamination by and conformity to one child's story. According to Devall's testimony at 115-10: Initially in the interview the conversation was with Josh, then Jeremy and Joseph confirmed. "I stared questioning them initially about the physical abuse. Josh said Joe his his tallywacker with a board, then I asked the

other children is that true, is that what happened and they said yes, that's what happened." Clearly, the children's accounts were influenced by each other.

There is further evidence of the (deliberate) use of peer pressure in the interview with Det. Fazio, when he "told Jeremy that I know that Big Joe said that all the kids hit and bite Joshua and asked why he would not say that he did it" and when he "asked Joshua why he wouldn't tell me that it occurred to him (putting Joe's penis in his mouth) because the other kids are telling me that it's happening to everybody."

The interviewers used direct specific leading questions to get information from the children

When Devall was asked at 115-10 hearing, How were the questions being asked? He replied, They were just general questions--like What happened? Has anyone ever touched you in a bad way? And then we related from there. I'm not sure what "and

then we related from there means, but I think what happened was that they started with these open-ended, general questions and then used more specific direct--and leading questions.

We can infer the use of direct the use of direct questions by Fazio's indication that children "denied" certain things. There are numerous examples of this in the reports:

e.g., Fazio's report of his first interview with Jeremy: "Jeremy said when q Joshua is tied up Big Joe hit's his dick and also pulls on it. Then Big Joe makes the other kids do it to Josh. Jeremy denied that he did it to Josh".

e.g., In second Fazio interview, "Jeremy denied all sexual contact' except for one thing" (that Joe makes him touch his penis with his hand). Jeremy

"denied" that Big Joe ever put his mouth on Jeremy's private or that Big Joe put his private in Jeremy's.

We can also infer that direct questions were asked of the interviewers say the child confirmed, or agreed or verified an allegation. There are examples of this in the report:

e.g., Devall at 115-10 says Josh was second interviewee with Fazio and he "verified almost everything Jeremy had said, plus more."

e.g., Devall at the 91-J-2 hearing, "they each verified the tying of hands and feet."

e.g., Devall at trial: "Jeremy verified that Joe made them beat up Josh and bite him."

We can infer that direct questions were asked if the reporter points out that certain--other--responses

were spontaneous.

e.g., Fazio to Grand Jury: Josh says that Big Joe hits his tallywacker and makes the other kids hit it. Makes the kids play with Big Joe's tallywacker. And then he started spontaneously into a statement on how Big Joe rubs his tallywacker real fast and then stuff comes out.

There are statements in the reports that sound like they must be responses to direct questions:

e.g., Jeremy "said that Big Joe puts his penis in Joshua's mouth and on his butt. He said Big Joe puts his penis on Krystal's butt." (These responses sound like they are in response to direct questions: Who else does Joe do this do? or What does Big Joe do

to Josh, to Krystal?

e.g., "Then Joseph said that he bites Krystal on the place that she goes potty." (This mention of biting Krystal sounds like it was in response to a direct, leading question, because the preceding response "quoted" in the report was not about Krystal or biting.)

There are examples of leading questions quoted in the reports:

e.g., "I asked Joseph who else Big Joe goes potty on." (Although this is a logical question, it is a leading question because it implies that there was someone else.) "Joseph said that it was Krystal. ...

e.g., "I asked Joseph to tell me what else

Big Joe does with his tallywacker." (rather than asking Does Big Joe do anything else? this question is leading because it suggests that Big Joe <u>does</u> do something else.)

e.g., "I asked Joseph to tell whose tallywacker Big Joe sucks. Joseph said Big Hoe only sucks his [Josh's] but Big Joe makes them suck each others.

e.g., "Then asked Joseph to tell me what Big Joe does to the other kids with his penis." (Leading question--could have asked does Big Joe do anything to the other kids with his penis.)

e.g., Jeremy said Joe hangs Josh upside down in their room on a piece of wood. "I asked Jeremy what he hangs him with and Jeremy said a

> piece of rope. I asked Jeremy how many times. He said two time." But maybe Joe didn't hang Josh <u>with</u> anything--this is an example of a leading/suggestive question.

We can also infer that direct, leading questions were asked from the fact that other interviewers noted that the children were not very forthcoming in their stories.

e.g., Dr. Sobolewski (1/9/91) at 115-10:

> Josh was fairly quiet and submissive and had a very flat affect and was not very vocal about things that happened to him unless specifically questioned.

When the interviewers used open-ended questions the children were less likely to allege abuse Sometimes the interviewer indicates clearly or specifies that a question was open-ended (i.e., not

direct, leading). The answers to these questions are critical because they are not subject to suggestibility. The following are all the examples of open-ended questions identified in the reports:

1. Det. Fazio at beginning of first interview on 1/17/91 asks Jeremy to tell him what Big Joe does to him: Jeremy says he ties them up with wire (usually because Joshua stole food). Jeremy does not spontaneously mention sexual abuse in response to this open-ended question.
2. In response to open-ended questions at beginning of his first interview with Fazio, Joseph described the beating.
3. Det. Fazio asked Joshua if he knew why he had come to the station. He said it was because Big Joe beats him and hurts his tallywacker. (This sounds like it was a spontaneous response, not suggested, but

it indicates physical abuse rather than sexual abuse.) At the second interview, Det. Fazio first asks Joshua to tell him what Big Joe does to him. Joshua said that he hangs him upside down when he is bad. (Despite fact he has already seen the anatomical drawings, Joshua still tells about hanging upside down first.)

4. Det. Fazio asked Krystal to tell him about Big Joe (open-ended questions). All she would say is Big Joe beats me.

5. Dr. Sobolewski (1/9/91) at 115-10: notes specifically that he tried to ask Josh open-ended questions and that what Josh said was that Joe pulled on his penis and tried to pull it off and demonstrated repeated stroking motion.

6. Dr. Neal at 115-10: also notes he used very open-ended questions and that what Josh said

was that Big Joe pulled on his penis, tried to pull his penis off.

Over successive interviews, the children's stories "pile up" sexual allegations

In his first interview with Fazio, Jeremy says only that Big Joe hung Josh upside down, tied them up, locked them in their room, hit Josh's penis with a board and pulled it, and made the other kids follow suit; he does not mention any sexual acts. In his second Fazio interview, "jeremy denied all sexual contact except for one thing. He said Big Joe makes him touch his penis with his hand." [one sexual act has been mentioned] After several months of therapy, (Glenda Hopper notes, 10/27/91) Jeremy says Joe touched us in our private parts. He tried to pull our penis off. He made us watch him touch Josh's. He made white snot come out of his. Sometimes he made us kiss his. Later, after more therapy, Jeremy says Joe put his penis in his butt

(this had been explicitly denied at Fazio interview). Here we see how Jeremy's allegations became more sexual over time. One possibility (held by therapists) is that the child is finally able to talk about the sexual abuse he has experienced. The other possibility (according to memory researchers) is that his story has been colored by repeated exposure to sexual accusations (by his brothers, implicit in interviewer's questions, in conversations with foster parents and therapists.)

A similar shift toward more sexual allegations is evident in Susan Bellas's notes: After 6 months of therapy, on 1/8/92, when she asked Jeremy what he was going to say in court, he said he would say Joe hanged him on the wall, spanked him with a belt, whipped him with wire, didn't feed them, and his mom should've told the cops. He mentions nothing about sexual abuse. But 2 weeks later, just before court, Jeremy said he will tell about Joe putting his

penis in brother;s caboose, making brother;s touch his penis, wanting to pull his brother's penis off, and putting his private in his brother's mouths. What was the difference between the two sessions? Had Jeremy met with lawyer to prepare for court or was therapist asking more pointed questions about sexual abuse?

The interviewers used repeated questions

This is apparent in Fazio's report of his second interview with Jeremy, when he "asked Jeremy again if Big Joe did anything to him." This is the only explicit mention of a repeated question--but there were likely others as well.

The interviewers may have used a forceful style of questioning

There is some indication that the interview by Fazio might have been perceived by the children (at least Jeremy) as somewhat forceful:

e.g., When Fazio asked Jeremy again if

Big Joe did anything to him, "Jeremy would only put his head down on the desk and refuse to talk." (Either Jeremy is very upset and embarrassed or Det. Fazio is intimidating, or both.)

e.g., When asked if anything comes out of Big Joe's penis, Jeremy again refused to talk about it.

e.g., Fazio at 115-10: Did jeremy indicate he knew what he was there for? (in 1/17 interview) Yes. What did he indicate? That he had to tell me about what Joe has done to them.

The interviews included subtle (implicit) suggestions as well as explicit leading questions

The anatomical drawings, in particular, were themselves suggestive. Use of anatomical drawings at beginning of Fazio's interviews, starts the

children's interview off on a sexual theme. For the boys, this occurred at the beginning of the second interview; for Krystal, the anatomical drawings were presented at the first interview. Fazio (at trial): "Krystal was not really too willing to talk to me. In reference to all the physical abuse and sexual abuse she didn't disclose too much, so I went directly to the anatomically correct drawings. I pointed to the penis and said what is this and she called it a wacker and she identified three spots (vagina, buttocks, mouth)--by drawing on them on a picture." Given the young age of this child and her verbal immaturity, it is unreasonable to think that she could withstand the suggestion implicit in the drawings or that she has the cognitive ability to respond to the task.

<u>The interviewers did not create negative stereotypes</u>

There is no evidence that the interviewers were judgmental, created "demand characteristics," fostered a negative stereotype of the stepfather, or

created an atmosphere of accusation.

Information from transcripts of the children's testimony

It is valuable to examine the children's responses in the only transcripts we have available--at trial. Their ability to answer the l;lawyers' questions about abusive behavior is probably a good clue to how they answered the interviewers' questions. In fact, inadequacies in their accounts would have been even greater in the original interview, because they were 14 months younger at the time.

Jeremy at trial (now age 8)

Jeremy is vague about what happened:

> Did you ever see Big Joe's penis? I don't remember.
>
> Did you see Big Joe touch Joseph with his penis? Yeah.
>
> Where did you see him touch Joseph at? I don't know that.

Did Big Joe ever make you touch him on his privates? I don't remember.

Did you ever see Big Joe touch Krystal with his privates? I don't know.

Joseph's testimony at trial (now age 7)

Joseph gives a completely unlikely sequence of events, which indicates confabulation is occurring--i.e., he is putting things together that don't go together:

What happened when he saw you sneaking food? He made me suck his private.

He shows a lack of understanding of the question (or the adult shows a lack of understanding of the response)

Joseph, do you know how many times Big Joe would touch you with his private parts? Once.

For each time that he touched you? Yes.

[This is an unclear (and leading questions)--what else could he say but yes?]

He shows the effect of repeating a question:

Joe, you said that you saw Big Joe put his penis in Krystal's mouth.

Where did that happen? I don't remember.

You don't remember what room that happened in? No.

Did it occur at the trailer? No.

Where did it occur? Um behind Grandma's house. [He says he doesn't remember but then answers anyway after the question is asked again.]

Josh at trial (now age 5)

He shows confusion:

He doesn't recognize Joe in the courtroom.

He claims Paul lived in t he trailer.

He denies he got into trouble because of food:

Did you ever get into trouble because of food? No. (question should have been, perhaps, for stealing food)

He shows that he is ready to answer any question that is posed, even if the answer if fanciful:

How many times did he tie you up? Seven.

How many times did he hang you upside down by your feet like that? Um, two.

Did [putting his private part in your mouth] happen more than one time? Um, he done it three times.

Here are answers that clearly demonstrate how the children's estimate of numbers of occurrences of the alleged acts should be distrusted completely.

When he hung you up, what happened? I, um, fell on my head.

Where would he hit you when he hit you with the paddle and the belt? On my foot.

How would he do that? Um, when Mom wasn't there.

Okay. Where would your feet be? He was stepping on them, and I couldn't get them up.

Here are some examples of Josh's glib-preposterous--answers.

Did he ever make you do like jumping jacks and things like that to punish you? Um, no.

Do you know what a jumping jack is? Um, no.

Here Josh demonstrates his willingness to answer questions even if he doesn't understand the question. He also shows his willingness to go along with the questions even if he doesn't know the answer:

Josh, didn't you just tell Teena a few minutes ago that you didn't remember or know if Big Joe put his penis in your bottom? Um, yes.

You couldn't remember it then, but you can remember it now when she asked you about it? Yeah.

He denies previously alleged abuse:

Did he do anything while you were hanging there upside down? No.

Did Big Joe do anything else to hurt you? Um, no.

Did he ever make them (his brothers) bite you? [leading\ Yeah.

How would he do that? He would bite--he would make them bite me on the leg.

Did he make them bite you anywhere else? No.

Did Big Joe ever make anybody else hurt you? He, um, he tied my hands to my back, and then he stands me in the corner, and he made my brothers throw a hard ball at my

back. Did that hurt you? Yes.

The only sexual abuse he testifies to is Joe touched his penis and made him touch his penis:

> Joshua, did Big Joe ever touch your private parts? Yes.
>
> And what did he touch them with? Um, his hand.
>
> What would he do with his hand? He would pull on it, my private.
>
> Did he touch you anywhere else on you privates? No.
>
> With his hands? On my butt.
>
> How did he touch your butt? With his hand.
>
> What would he do there? He wouldn't do anything except touch it.
>
> What about his private part, he he touch you with that? Um, no.
>
> He never put that on you? No.
>
> Okay, what did he do with his private part?

He, um, made me touch it.

And how would he make you touch it? With my hand.

What did he make you do with your hand?

He would make me pull on it.

Conclusions about children's reports

Jeremy: In the first interview with Fazio, Jeremy indicates only that his stepfather is physically abusive. In the the second interview with Fazio (which is at least the fifth interview--formal or informal--that we know about and which occurs 3 weeks after the initial report and after the stress of being removed from the home and placed in foster care), Jeremy also indicates that Big Joe puts his penis on Joseph's mouth and butt. There is evidence of leading questions, repeated

questions, pursuit of a single hypothesis (of abuse), and use of peer pressure in the interviews with Jeremy. At the trial, Jeremy testifies that Joe touched the children's penises and bottoms and that he touched Josh's bottom and mouth with his penis. He does not remember any other sexual allegations. Several people indicate Jeremy was reluctant to talk. The assumption is that he was covering up and that it took time for him to "disclose" abuse. There is also a possibility that he had nothing to say early on because the alleged acts had not occurred and that later he had incorporated the direct or indirect suggestions of the interviewers and counselor.

- Joseph: There is clear evidence that Joseph was asked direct, leading questions in the first interview with Det. Fazio, and there is a suggestion in

this testimony that he could have been influenced by such questions. This may have lead to elaboration and increased allegations of sexual abuse. However, there is also evidence suggesting that on two issues Joseph answered spontaneously: Specifically he volunteers that Big Joe made the boys bite Joshua's penis ("tallywacker") and that he ejaculated ("goes potty") on Joshua. Joseph's statement that Big Joe made the children put his penis in their mouths also appears not to be the result of any direct, immediate preceding suggestions. I would not place much weight in the other allegations in this or the subsequent interview because of the possibility that many suggestions had been made by the time that interview was conducted.

Joshua: It is difficult to know whether what Joshua is describing early on (to the nurse, Mr. Devall, the foster mother, and Det. Fazio) is sexual abuse or simply physical abuse. He talks about Big Joe hitting his penis, pulling on it, and having the other kids bite and hit it. Only if the observers accurately interpret the "pulling" Joshua is describing or demonstrating as sexual nature, does Joshua indicate sexual abuse before any leading or suggestive questions. It is also not clear whether leading or suggestive questions were asked to get Joshua to say that Big Joe makes all the children masturbate him (Big Joe) or perform oral sex on him. One can infer that leading questions and some pressure were used in the interviews with Fazio, and Joshua's trial testimony clearly demonstrates

his willingness to go along with direct questions, even to the point of giving preposterous responses.

Krystal: This child is very young. In the interview lasting 30-40 minutes, all she spontaneously offers is that her stepfather beats her. I would not place much weight in the fact that she pointed to the private parts on the drawings. The drawings are themselves "suggestive."

Observed problem behavior of children

Despite the fact that questions can be raised about the children's verbal testimony, there is evidence that the children's behavior is disturbed. Several of these disturbed behaviors are related to the allegations of physical behavior:

9/5/91 Jeremy's foster dad concerned because he steals candy and is not fazed by consequences. So there rally is a problem

with stealing food.

3/1/91 Joseph's foster mom notes he looked terrified when she came in and he was getting chips out of the bag. So it looks like the kids really were punished for taking food.

6/14/91 observed that when she reached up to push hair out of his face, Joseph jerked back, though she was going to hit him. This supports the charge that the children were used to being hit.

There are also a number of disturbing behavioral observations that demonstrate that the children are highly sexualized, have been exposed to sexual acts: Children use "baby language" to describe sexual acts (indicating they have not just been told about these things(or influenced by suggestive questioning):

e.g., Fazio interview "I asked Joseph to tell me what else happens when Big Joe's

tallywacker. Joseph said that Big Joe plays with it and then it sticks up. Then after it sticks up he goes potty on Joshua." ("going potty" is not the way an adult would describe ejaculation.)

e.g., semen is described as looking like white snot, snow, the sky

Joseph was a chronic bed wetter (this is not proof of sexual abuse, but it is not inconsistent with it.)

Joseph and Josh acted out sex scenes in the bathroom, played with themselves in front of foster parents, acted out sex scenes with stuffed animals.

Joseph pulled on the other little boys' privates at school, touched other boys' penises and butts at school. Joshua "demonstrated" for the ER

staff what Big Joe did: tried to pull his penis off: pulled back and forth on his penis as to ejaculate.

Krystal masturbated, danced provocatively: you put your butt by my butt (crotch).

Motivation

There is ample evidence in testimony by Bellas and Devall that the children were angry at Joe, even hated him. They also indicate that they with they were with their real dad (who, according to Bellas notes 8/6/91, was back together with Sherry--or is this wishful thinking by Jeremy?) It is common reaction for children to dislike a stepparent. They resent the intrusion and reduced contact with the biological parent. Thus there is good motivation for the children to go along with or make negative statements about Joe. Nevertheless, it is also common for stepparents to abuse their children. Recent research reveals that the rate of physical abuse by stepparents is 7 times higher than genetic parents,

and rate of fatal abuse is 100 times greater. (82% of the murdered stepchildren were beaten to death Daly & Wilson 1996).

Alternative explanations for sexual abuse

It is possible that sexual abuse started earlier with Paul.

It is possible that suggestions about sexual abuse has been planted in the children's minds before the case came to light. Sherry, at trial, testified that Jeremy told her that (uncle) Johnny wanted him to tell his teacher that Big Joe was sucking on his tallywacker.

It is possible that the children were sexually abusing each other. Josh and Joseph were together in foster care after 10/27 and this preceded their sexual acting out. One year after placement and therapy, Krystal returned form a visit with mother, grandmother, grandfather, and brothers with a red vagina.

CONCLUSION ABOUT PHYSICAL ABUSE

The following are my conclusions about the likelihood of each of the physical abuse charges based on close examination of Devall/Fazio reports and testimony and testimony by Joe , Sherry, and the children.

Beating the children

It seems clear that Joe punished the boys by hitting them with a belt and a 2x4 "paddle" (as well as with his hand and perhaps with a TV wire). The bruises on the children were probably from the belt. But there is no indication that Joe deliberately hit the children with the belt buckle. That he hit the children too much is suggested by Sherry's testimony and how own belief that "excessive corporal punishment" means "beating the kids to the point where you won't stop or they get severely injured." The children may

overuse the word "beat", but Joe undoubtedly overused the belt. Jeremy may not know what has caused the bruise on his back; it could be that he was hit with a belt but also sustained injury when he fell down the stairs (as Joe claims).

Hitting Josh's penis with a board

I suspect that Joe may really have hit Josh's penis with the paddle. This is the first thing Josh says at Devall's interview with the three boys; it precedes any biased interviewing about sexual abuse. But it may have happened only on one occasion (the night before the first interview), and it may have been an accident. The reports by Fazio and Devall make it sound as if the behavior is habitual, but I see no evidence of that in the children's stories.

Throwing Josh across the room

When the throwing incident occurred, Joe was angry: it had been a bad day; Josh was "disobedient" and then he peed all over Joe and Joe

and Sherry's bed. Joe swore at Josh (Get the fuck out...) and told him to get out of the room. He removed him from his wet lap and bed--undoubtedly with some force. Did Joe "pick Josh up and throw him across the room" like a football? This is unlikely. Joseph says he threw him on the floor. Jeremy just says he threw him--and that he was immediately sorry and attended to Josh's cut chin. But Jeremy also mentions that Joe and Sherry untied Josh's hands and untied feet after he fell--so if he had his hand and feet tied no wonder he fell. Josh himself might not know exactly what had happened to him; it might have felt as if he was "thrown" even if he just slipped or tripped and flew forward onto his face (especially if he got a push to begin with and had his hands and feet tied). I suspect Joe probably did give him a push, even if it was unintentional. Joe was a full-grown man, Josh was just a little child, and Joe was pissed (on). If Joe was in the habit

of picking the kids up and heaving them across the room, there should have been physical evidence of other scars or fractures.

Tying the children up

I think Joe did tie the kids' hands together--again, perhaps as a way of controlling them. He may also have tied their feet together. He likely tied hands behind their backs. He may have tied them up when Sherry was out of the house and he was having trouble controlling the passel of young kids. Consistent with what Jeremy said at trial, he probably did not tie them up in order to spank them--it would have not have been necessary; they were just little kids. Joe claims he did not tie the children's hands for punishment. I doubt that he tied their hands and feet together behind their backs and hung them up and beat them. The tying up was inappropriate, but it may not have been part of a sadistic torture routine as seems to be suggested (by

Nurse Station, Fazio and Devall).

Hanging upside down

In the trial, Jeremy corroborates Sherry's claim that hanging Josh from the rafter was done in fun. Unfortunately it was not fun for Josh-- but Joe was being playful. Fazio's description of the children as naked and hung up by their feet with rope while they were interrogated is ill founded. He has put together a scenario from fragments: Jeremy (in Fazio's report of interview) did say (possibly in response to leading questions) that (a) the children were tied up and (b) Josh was hung up, but there is no indication that these were at the same time. His mention of rope was in response to a leading question. In Fazio's report of his interviews with Josh and Joseph, it looks as if Joe threw Josh across the room cutting his chin, and then he stripped Josh and then he hung him upside down, and then he had the other kids beat him. This sequence of events is

unlikely; all the other accounts says that Joe and Sherry attended to Josh's cut as soon as it happened.

Josh's testimony at the trial indicated how he exaggerates or makes things up:

e.g., Joe hung him up and fell on his head! (Note Dr. Sobolewski's comment about Josh that "The child was not very vocal about things that happened to him unless specifically questioned.") I don;t think Josh can give a coherent account of sequence of events as Fazio's use of the word "then" implies (and Joseph was questioned after Fazio already had interviewed Josh).

At the trial, when Joseph says Joe hung Josh up "to torture him"--he does not mean it literally. He mean (I think) that Joe was teasing Josh (cruelty,perhaps).

"Peer pressure"

Joe admits that he used the children to punish each other (Navy style). Josh had child-mouth-sized bite marks on his stomach. So even though Jeremy and Joseph both deny making the marks themselves, one can only infer that one or both of them did bite Josh. And although Joseph was inconsistent about whether it was Josh or Jeremy that Joe made bite him, he did not deny that biting happened. Whether Joe ordered them to do so or merely allowed them to do so is not important. Either way, this constitutes inappropriate and abusive discipline. In general, evidence that Joe disciplined the children inappropriately is clear. The children were hit so hard (with a belt or a board) they had bruises. They were punished by being kept in their rooms, lying on the floor, for hours (Sherry, 91-J-2). They were encouraged to hit and hurt the other. Nevertheless, the portrait of Joe as a sadistic torturer

does not ring true. This man was undoubtedly overwhelmed and out of control. He was ill-prepared for his role as father of five young children under 8 years, children who, except for the baby, were not his. The children resented his presence and authority (e.g., in first interview with devall, all the children stated that they wished they were with their real dad. Later, Josh claimed that Joe didn't feed him because he hates him). The family was living in a cramped and inadequate quarters. His wife was pregnant and both parents were working all the time to try to make ends meet. The task of managing the children often fell on Joe, whose experience in discipline came from the Navy, and whose ideas about how to control children were simply misguided, as evident in his belief that "excessive punishment" is beating the kid to the point where you won't stop or they get severely injured.

Given the inadequacy of the environment and Joe's competence as a parent, it may have been in the children's best interest to spend some time in foster care until Joe could learn more effective and humane disciplinary strategies and until the physical environment of the home was improved.

It is my opinion that the overall description of sadistic abuse that was gleaned from the children's answers to questions in Devall's and Fazio's interviews is inaccurate. I believe that the investigators took the children's answers to their questions at face value and pasted them together into a worse-than-reality picture.

The children--especially Josh-- were very young. Their view of the world was probably somewhat distorted by their life experiences. Their lives were chaotic and crowded and in many ways unpleasant. They undoubtedly were punished severely and

inappropriately (in fact, there were other people, like Uncle John, who also apparently punished them). In their view they were "beaten"-- even if Joe and Sherry prefer to call it "spanking" But I doubt that Joe deliberately threw the children across the room or that he bound and hung them from the ceiling, unclothed, while he beat them with a belt, a wire, or a stick. This is a scenario created by adults on the basis of the children's responses to questioning. Unfortunately we do not have verbatim transcripts of the children's interviews. All we have is a verbatim account of the children's testimony at trial. In the trial transcripts we see Josh's lack of maturity and lack of understanding--and this is when he is a year older than he was at the time of the initial interviews. Josh claims ion the trial that Joe just tied him up and left him, that it happened seven times,m that he fell on his head when he was hung up, that Joe hit with the paddle and belt on his foot, when he was

stepping on them. These are new)and ludicrous) claims. Josh's lack of understanding is illustrated in his response to the question--"Did you ever get into trouble because of food? No." He doesn't understand the question--which should have been asked, Did you ever get into trouble because you took some food?

The most accurate account would be Jeremy's testimony, t 91-J-2 hearing, because jeremy is the oldest child and this hearing is closer in time to the alleged events (and before therapy). His testimony at this hearing is, however, generally consistent with Joseph's later testimony at the trial. From their testimony a more benign picture of Joe's behavior emerges. In their testimony they say that the children were spanked (this happened often, in their opinion, but of course in the receiver's mind (or behind) even a few spankings would be a lot) and they were punished by having their hands and feet tied behind

their backs. They were blocked in their room with drywall but they could move the drywall sideways, so they were not tapped. The hanging of Josh occurred in play and was not so he could be beaten and he was not tied up to the ceiling , his legs were hung over the rafter. Josh was "thrown" (but it was not across the room and Joe was sorry). There is nothing here about beating naked children hung from the ceiling with rope while their hands and feet were bound with wire.

CONCLUSION ABOUT SEXUAL ABUSE

Inconsistency between sexual abuse allegations in interviews and trial testimony

Jeremy: Only one of the points made by Jeremy at the trial is identical to original report (Joe touched Josh's bottom and mouth with his penis.) Otherwise, we see there are two new allegations (Joe touched jeremy's penis and bottom. These may be intrusions from therapy--but it is unclear what

children understand when they are asked about "touching." There are two previous allegations not remembered at trial (Joe made Jeremy masturbate him and Joe put his penis in Krystal's bottom). Nothing is mentioned by Jeremy at trial about Joe hitting and pulling on Josh's penis or making the other kids do it--which was what Jeremy first said (in Fazio's interview and original Devall interview with the three boys).

Joseph: In his trial testimony Joseph does not mention the following allegations apparently made in the original interviews: Joe made kids bite Josh's penis, Joe makes kids suck each other's penises, Joe plays with his own penis and then it sticks up., Joe ejaculates (goes potty) on Josh, Joe bites Krystal's vagina. Joe makes children watch Sherry put Joe's penis in her mouth. But what he <u>does</u> mention is consistent with earlier interviews (and incriminating): Joe put his penis in Josh's

bottom and Krystal's mouth, sucked Joseph's penis, and made Joseph suck Joe's penis.

Josh: Josh makes no mention of the following allegations apparently made in the original interviews: Joe hitting Josh's penis with a board, making other kids hit it, biting on Josh's penis, masturbating in front of them, and making Josh suck on Jeremy's and Joseph's penises. Josh denies that Joe "touched" Josh with his penis and does not mention Joe putting his penis in his butt when asked did he pout it "anywhere else". Josh may not understand what "touch" means in this context--that examiner is looking for anal penetration. There is still the consistent claim that Joe pulled on Josh's penis and made Josh pull and suck Joe's penis.

<u>Consistent claims in different interviews, hearings, conversations with therapist, foster parents</u>

Jeremy: Joe pulled on Josh's penis
made kids touch Joe's penis

put penis in Josh's , Joseph's mouths

put penis in Josh's, Joseph's butt

Joseph: Joe put penis in Joseph's butt

Joe made kids suck his (Joe's) penis

Joshua: Joe pulled on Josh's penis

Joe made Josh suck/to\ouch his penis

Conclusions about specific charges of sexual abuse

Joe pùlled on the children's penises

According to Jeremy and Josh, Joe pulled on Josh's penis while he was ties upside down. They said this to their foster mom, before the interviews with Fazio. Josh demonstrated it to the hospital staff on the first night. I think, therefore there is high probability that this happened. It may not have been sexual intent, however, and I think it is unlikely that Josh was tied upside down at the time.

Joe forced stepsons Jeremy and Joseph to hit, pull, bite and suck Josh's penis

In his first interview with Fazio, Jeremy says Joe forces them to hit and pull on Josh's penis. This is relatively early on in the interview process and it should be given some credence because Jeremy, being the oldest child, is likely to be the most reliable witness. Jeremy does not say anything about biting. Joseph says Joe made them bit Josh's penis. He says it early in the first interview with Fazio and not apparently in response to a leading question. Early in first interview with Fazio, Josh says that Big Joe makes the kids hit his penis. I think it is probably true that the kids did hit, pull, bite Josh's penis. These behavior could have been playful or punitive (or both; they were not necessarily sexual. Joe may not have forced them to do these specific acts, but he did encourage them to hurt each other (peer punishment), and these behaviors could have been among the ways they did so.

Joe masturbated in front of the children

The children (at least Joseph and Joshua) had clearly been exposed to some adult male masturbating and ejaculating. They described it accurately and in childish terms (sticking up, looking like snow, white snot, going potty). Also this is one of the allegations that Fazio to Grand Jury describes as spontaneous; "Josh spontaneously says how Big Joe rubs his tallywacker real fast and then stuff comes out." I think it is highly likely that they did observe Joe masturbating. It is unlikely that it was Paul whom they saw, because Josh would have been less than 2 year old when Sherry was living with Paul.

Joe forced the children to watch him and his wife have sex, including oral sex

Sherry did admit that the children had probably seen them having sex, and it seems that this would have been inevitable consequence of living in a one-

room house for a year (during which she conceived a baby). She says the children did not witness them having oral sex, but if Sherry and Joe had oral sex, the kids probably saw it. The children are knowledgeable enough about this act that I believe they must have witnessed it. This in itself, however, does not constitute child sexual abuse. I doubt that Joe "forced" them to watch--but he may very well have said something like"you should watch."

Joe had the children touch his penis (with their hands)

This is reported consistently across interviews by both Jeremy and Josh. But it appears to be in response to direct questions. Because the issues of suggestibility cloud these answers, I cannot determine (or guess) whether this happened or not.

Joe sucked the children's penises/private parts

In his first interview with Fazio, Joseph says Joe

sucked Josh's penis and Krystal's vagina. His statements may have been in response to leading questions. Jeremy, in the second interview with Fazio,. denied that Joe sucked his penis. This behavior is not reported consistently across interviews or interviewees. I would say the allegation is not well founded.

Joe put his penis in children's mouths/made them suck it/masturbated on them

All three boys consistently reported that Joe did this to Josh and Joseph. It sounds like Jeremy said it spontaneously--but it is fairly far into the interview process (it occurs in the second interview with Fazio, after he has put his head on the desk and refused to answer). Joseph describes this act as Joe "going potty" on Josh. This sounds like it is not in response to leading questions. The allegation that Joe put his penis in the children's mouths was a response to a leading question: "What else does Joe do with

his penis?" However, the response may be incriminating, because Joseph could have said something innocuous, like he goes to the bathroom. I cannot determine whether this happened or not.

Penetrated the children anally with his penis

Jeremy and Joseph alleged that Joe did this to Josh and Joseph. As with the preceding charge, it sounds like the allegation was made spontaneously by Jeremy but it occurred fairly far along in the (flawed) interview process. Joseph's foster mother also reported that he made this allegation, outside of the interview context, but after he had been interviewed by devall and Fazio (once). I cannot determine whether this charge is true.

In sum, of the eight alleged sexual abusive acts, four are probably true but do not constitute sexual abuse (Joe pulling on Josh's penis, letting the kids pull on Josh's penis, masturbating, and having sex with his wife in front of the kids). Evidence for

other allegations (making the kids touch his penis, sucking on the kids' penises, putting his penis in their mouths, masturbating on them, penetrating them anally) is quite shaky because of problems in the interviewing process and the young age of the children interviewed. I think some or all of them may have occurred (the most likely being that Joe masturbated on the kids), but the evidence presented is not convincing. However, the fact is that these children are highly "sexualized". This is evident in their overt sexual behaviors beyond anything that they said to the interviewers. The question is whether Joe (alone and intentionally) is responsible for this. I seriously doubt that it is all Joe's fault. Just as I believe the extreme disciplinary displays were to a great extent function of the circumstances, I believe the sexualization of these children went beyond Joe's behavior. Partly, it too, could have been the consequence of living in crowded conditions

in which adults set a vivid example of active sexuality. Partly, it could be that Joe was naive about "sexual" behaviors with the kids just as he was naive about "disciplinary" behaviors. This could be a way of reconciling his denial of all charges of sexual abuse with the boys' testimony that he did engage in certain acts of a sexual nature. He may have been joking around; he may have been inappropriately bawdy. I suspect that the sexual scenes these children were exposed to (and may have participated in) may have pre-dated Joe's tenure in the home.

OPINION

It is my opinion that the portrait of Joe Deerwester as depraved child molester is unfounded. There is ample evidence that he behaved inappropriately with the children in terms of discipline. The physical evidence on this is clear. I suspect that he also behaved inappropriately with the children in term of

"sexual" actions. He probably did too much playing around with penises, his own and theirs--perhaps naively. I do not believe that he is a chronic child molester or that he is unrehabilitable. The evidence for serious sexual abuse, in my opinion, is simply weak. Moreover, even if Joe Deerwester were guilty of all the charges he was convicted of, I do not believe this would justify termination of his parental rights. There is no possibility that during supervised visits (in prison) he could exhibit the inappropriate behaviors toward the children of which he has been convicted.

USA TODAY

THURSDAY, APRIL 16, 1999

By Ben Fenwick Reuters

DNA SAVES MEN:

An Oklahoma death row inmate and another man imprisoned in connection with a 1982 rape-murder are expected to be freed today after DNA tests invalidated the evidence used to convict them, Pontotoc County District Attorney, Bill Peterson said. Peterson prosecuted Ronald Williamson, now 46, and Dennis Fritz, now 49, in 1987 for the death of 21-year old Debra Sue Carter, five years after she was found raped, beaten and strangled. "Needless to say, I was speechless," Peterson said. "There was no doubt in my mind that they were guilty."

U.S. NEWS

November 9, 1998

THE WRONG MEN ON DEATH ROW

A GROWING NUMBER IF BAD CONVICTIONS CHALLENGES THE DEATH PENALTY'S FAIRNESS

BY JOSEPH P. SHAPIRO

Gary Gauger's voice was flat when he called 911 to report finding his father in a pool of blood. Police arrived at the Illinois farmhouse Gauger shared with his parents and discovered that his mother was dead, too. The 40-year old son, a quirky ex-hippie organic farmer, became a murder suspect. "After all, someone had slashed Ruth and Morrie Gauger's throats just 30 feet from where Gary slept. There were no signs of a struggle or robbery. But what most bothered the cops was the son's reaction: He quietly tended to his tomato plants as they

investigated. Eventually Gauger was sentenced to die by lethal injection--until it became clear, police had the wrong guy. His case is not unusual.

After years of debate, most Americans now believe the death penalty is an appropriate punishment for the most repulsive murders. But that support is rooted in an underlying assumption: that the right person is be executed. The most recent list by an antideath-penalty group shows that Gary Gauger is one of 74 men exonerated and freed from death row over the past 25 years-a figure so stark it's causing even some supporters of capital punishment to rethink whether the death penalty can work fairly. Among them is Gerald Kogan, who recently stepped down as chief justice of Florida;s Supreme Court. "If one innocent person is executed along the way, then we can no longer justify capital punishment," he says.

Mistaken convictions. For every 7 executions--486 since 1976--1 other prisoner on death row has

been found innocent. And there's concern even more mistaken convictions will follow as record numbers of inmates fill death rows, pressure builds for speedy executions, and fewer attorneys defend prisoners facing execution. Next week, Gauger and scores of others mistakenly condemned will gather at Northwestern University School of Law in Chicago for the National Conference on Wrongful Convictions & Death Penalty. They are "the flesh and blood mistakes of the death penalty." says Richard Dieter of the Death Penalty Information Center.

Time sought. Executions have been rare since the death penalty was reinstated in 1976. But the pace was picking up. There are now 3,517 prisoners on death row in the 38 capital -punishment states--an all-time high and a tripling since 1982. The 74 executions in 1997--the most since 1055--represented a 60 percent spike from the year before. Citing bad

lawyering and mistaken convictions, the American Bar Association last year called for a death-penalty moratorium. This month, Illinois legislators will vote on such a ban. The state, more than any other, is grappling with the problem. It has exonerated almost as many men (nine) on death row as it has executed (11).

It's tempting to view the reprieved as proof that the legal system eventually corrects its mistakes. But only one of the nine men released in Illinois got out through normal appeals. Most have outsiders to thank. Northwestern University journalism professor, David Protess and four of his students followed leads missed by police and defense attorneys to tie four other men to the rape and murders that put four innocent men in prison. "Without them, I'd be in the graveyard, " says Dennis Williams, who spent 16 years on death row. "The system didn't do anything."

Most damning of the current system would be proof that a guiltless person has been executed. Credible, but not clear cut, claims of innocence have been raised in a handful of executions since 1976. Lionel Herera dies by lethal injection in Texas in 1993 even though another man confessed to the murder. The U.S. Supreme Court ruled that, with his court appeals exhausted, an extraordinary amount of proof was required to stop his execution. Governors, the court noted, can still grant clemency in such cases. But what was once common is now so politically risky that only about one death row inmate a year wins such freedom.

How wrongful convictions happen: Gary Gauger's calm gave cops a hunch. But it was Gauger's trusting nature that gave police a murder tale that day in 1993. Gauger says that during 18 hours of nonstop interrogation, detectives insisted

they had a "stack of evidence" against him. They didn't-but it never occurred to the laid back farmer that his accusers might be lying. Instead, he worried he might have blacked out the way he sometimes did in the days when he drank heavily. So Gauger went along with police suggestions that, to jog his memory, he hypothetically described the murders. After viewing photos of his mother's slit throat, Gauger explained how he could have walked into her rug shop next to the house ("she knows and trusts me"), pulled her hair slashed her throat and then done the same to his dad as he worked in his nearby antique-motorcycle shop. To police, this was a chilling confession. Even Gauger, by this point suicidal, believed he must have committed the crimes.

False confessions. Though police failed to turn up any physical evidence during a 10-day search of the farm, prosecutors depicted Gauger as an oddball

who could have turned on his mother and father. He was a pot-smoking ex-alcoholic who once lived on a commune and brought his organic farming ways back to Richmond, Illinois. The judge rolled his eyes during Gauger's testimony and, when defense attorneys objected, simply turned his back on Gauger. The jury took just three hours to reach a guilty verdict. "Nutty as a fruitcake," the jury foremen declared afterward.

A study by Profs. Hugo Bedau of Tufts University and Michael Radelet of the University of Florida found three factors common among wrongful capital convictions. One third involve perjured testimony, often from jailhouse snitches claiming to have heard a defendant's prison confession. (At Gauger's trial, a fellow inmate made a dubious claim to hearing Gauger confess. The man, contacted in jail by U.S. News, offered to tell a very different story of the magazine would pay for an interview). One of every

7 cases, Bedau and Radelet found, involves faulty eyewitness identifications, and a seventh involve false confessions, like Gauger's.

False confessions occur with greater frequency than recognized even by law enforcement professionals, argues Richard Leo of the University of California-Irvine. About a quarter, he estimates, involve people with mild mental retardation, who often try to hide limitations by guessing "right" answers to police questions. Children are vulnerable, too. Chicago police in September dropped murder charges against two boys, 7 and 8 years old, who confessed to killing 11-year old Ryan Harris with a rock to steal her bicycle. After a crime laboratory found semen on the dead girl's clothes, police began looking for an older suspect. An educated innocent person, likely to trust police, may be especially prone to police trickery--which courts allow as often necessary to crack savvy criminals. "My parents had just been

murdered and these were the good guys." Gauger says. "I know it sounds naive now, but when they told me they wouldn't lie to me, I believed them." The falsely convicted is almost always an outsider--often from a minority group. In Illinois, six of the nine dismissed from death row were black or Hispanic men accused of murder, rape, or both of white victims. But the No. 1 reason people are falsely convicted is poor legal representation. Many states cap fees for court-appointed attorneys, which makes it tough for indigents to get competent lawyers. And it's been harder for inmates to find lawyers to handle appeals since Congress in 1996 stopped funding legal-aid centers in 20 states.

How wrongful convictions get discovered: Gary Gauger has a simple answer to how he won his freedom: "I got lucky." Of all the 74 released from death row, Gauger's stay was one of the briefest-just eight months. Shortly after his conviction, FBI

agents listening in on a wiretap overheard members of a motorcycle gang discussing the murder of Ruth and Morrie Gauger. Last year, two members of the Outlaws Motorcycle Club, Randall "Madman" Miller and James "Preacher" Schneider, were indicted for the Gauger killings. But a federal judge last month ruled the wiretaps were unauthorized and dismissed all the charges. The U.S. Attorney says he is seeking to reinstate them.

Even when another person confesses, the legal system can be slow to respond. Rolando Cruz and Alejandro Hernandez spent 10 years each on death row in Illinois for the rape and murder of 10-year old Jeanine Nicarico. Shortly after their convictions, police arrested a repeat sex offender and murderer named Brian Dugan who confessed to the crime, providing minute details unknown to the public, Prosecutors still insisted Cruz and Hernandez were the killers--even after DNA testing linked Dugan to

the crime. At Cruz's third trial, a police officer admitted that he's lied when he testified Cruz had confessed in a "vision" about the girl's murder. The judge then declared Cruz not guilty. In January, seven police officers and prosecutors go on trial charged with conspiracy to conceal and fabricate evidence against Cruz and Hernandez.

Discarded evidence: DNA profiling, perhaps more than any other development, has exposed the fallibility of the legal system. In the last decade, 56 wrongfully convicted people have won release because of DNA testing, 10 of them from death row. Attorneys Barry Scheck an Peter Neufield, with the help of their students at New York's Cardozo School of Law, have freed 35 of those. But their Innocence Project has been hobbled by the fact that, in 70 percent of the cases they pursued, police had already discarded semen, hair, or other evidence needed for testing.

Gauger had no other thing going for him that is key to overturning bogus convictions: outside advocates. Most important was his twin sister, Ginger, who convicned Northwestern Law School Prof. Lawrence Marshall (who also defended Cruz and organized next week;s conference) to help her brother a week before the deadline for the final state of appeal. In September 1994, Gauger's death sentence was reduced to life in prison. Two years later, he was freed. Marshall visited Gauger in prison with the surprise news. "That's good," he said with a smile and his customary calm.

How to prevent wrongful convictions: It's a fall afternoon and starlings are fluttering through the colorful maples that frame the Gauger farmhouse. Gary Gauger loads a dusty pickup with pumpkins, squash, and other vegetables. Inside Ginger has taken up her mother's business of selling Asian

kilims and American Indian pottery. A friend runs the vintage motorcycle business, still called Morrie's Place, in an adjoining garage. For Gary Gauger, life seems normal again. Customers at his vegetable stand sort through bushels of squash. A hand-lettered sign advises: "Self-Service: please place money in blackbox...thanks."

But there is pain, too, for his lost parents and for his 31/2 lost years. And it's that part of his story Gauger will share at the upcoming conference in the hope of sparing others such pain. Other conferees at the Northwestern event are expected to endorse a moratorium on executions at least until safeguards are in place such as increased legal aid, certification of capital-trial attorneys, limits on use of jail-house snitches, access to post-conviction DNA testing, and the recording of all police interrogations. There will also be appeals for accreditation of forensic experts: The fist Cruz trial turned on a bloody footprint

identified by an expert who was later discredited when she claimed she could tell a person's class and race by shoe imprints.

Gauger says the worst part about being wrongfully convicted is knowing that the guilty person is free. The victim Gauger most thinks about is 7 year-old Melissa Ackerman. The little girl was grabbed from her bicycle, sodomized, and left in an irrigation ditch, her body so unrecognizable that she could only be identified by dental records. She was killed by Brian Dugan, while Rolando Cruz and Alejandro Hernandez sat behind bars--falsely convicted of another child's murder committed by Dugan.